TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 117.

FRANK D. THOMPSON, TRUSTEE IN BANKRUPTCY OF HERBERT E. MOORE, BANKRUPT, PLAINTIFF IN ERROR,

vs.

HENRY FAIRBANKS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

FILED SEPTEMBER 21, 1904.

(19,070.)

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1 Supreme Court of Vermont, Caledonia County.

Pleas of the honorable supreme court of the State of Vermont for the county of Caledonia, begun and held at Montpelier, in the county of Washington, on the second Tuesday of May, A. D. 1903, being the 12th day of said month, and being a general term of said court.

Present: Hon. John W. Rowell, chief judge, Hon. James M. Tyler, Hon. Loveland Munson, Hon. Henry R. Start, Hon. John H. Watson, Hon. Wendell P. Stafford, Hon. Seneca Haselton, associate judges.

On which day the court was opened and continued its session from day to day, for the disposition of causes, until the 30th day of July, A. D. 1903, when the same was adjourned without day.

FRANK D. THOMPSON, Trustee,
vs.
HENRY FAIRBANKS. } No. 1358.

Be it remembered that at the May term, A. D. 1903 of the supreme court of the State of Vermont, begun and held at Montpelier, in the county of Washington, comes Frank D. Thompson, trustee in bankruptcy of the estate of Herbert E. Moore, bankrupt, by due appointment and qualification in the United States district court for the district of Vermont, by Porter & Thompson his attorneys and brings before said court for revision a certain judgment upon an issue impleaded before the honorable county court within and for the county of Caledonia, with his bill of exceptions thereto, as in said county court duly allowed, at the December term thereof, A. D. 1902, which issue, judgment and proceedings are in the words following, that is to say:

Be it remembered, that in a term of the county court, begun and held at St. Johnsbury, in the county of Caledonia and State of
2 Vermont, on the first Tuesday of June, A. D. 1901, comes Frank D. Thompson, who is trustee in bankruptcy of the estate of Herbert E. Moore, bankrupt, by due appointment and qualification in the United States district court for the district of Vermont, who brings this suit as such trustee, of St. Johnsbury in the county of Caledonia, by Porter & Thompson, his attorneys and brings into the court now here his certain writ and declaration against Henry Fairbanks, of St. Johnsbury, in the county of Caledonia, wherein the said defendant is summoned and attached to answer to the plaintiff in a plea of the case, for that the defendant, heretofore, to wit: on the 1st day of April, A. D. 1901, at St. Johnsbury in the county of Caledonia was indebted to the plaintiff in the sum of fifteen hundred dollars, for work and labor, care and diligence of

the plaintiff done performed and bestowed, and for materials for the same, provided before that time, in and about the business of and for the defendant by the plaintiff and at the defendant's like special instance and request; and, also, in the like further sum of money, for divers goods, wares and merchandise, before that time sold and delivered to the defendant by the plaintiff, and at the defendant's like special instance and request; and also, in the like further sum of money for money before that time lent and advanced to the defendant by the plaintiff, and at the defendant's like special instance and request; and, also, in the like further sum of money, for other money, before that time paid, laid out and expended for the defendant by the plaintiff, and at the defendant's like special instance and request; and, also, in the like further sum of money, for other money by the defendant before that time had and received for the use of the plaintiff; and, also, in the like further sum of money, for interest, for the plaintiff's forbearance at the said defendant's request, of moneys due and owing from said defendant to plaintiff; and,
3 also, in the like further sum of money, found to be due from the defendant to the plaintiff upon an account before that time stated between them; and, in consideration thereof, then and there undertook and faithfully promised to plaintiff to pay the plaintiff the said several sums of money in the count mentioned, when thereunto afterwards requested. Yet though often requested the defendant has never paid the same, but wholly neglects and refuses so to do.

And in a further plea of the case for that whereas, on the 30th day of June A. D. 1900, Herbert E. Moore of St. Johnsbury, in the county of Caledonia, aforesaid, filed his voluntary petition in bankruptcy in the United States district court for the district of Vermont, and on the 3d. day of July, A. D. 1900, in and by said court was duly adjudged a bankrupt, and thereafter on the 15th day of September, A. D. 1900, the plaintiff was in and by said court appointed and qualified as trustee in bankruptcy of said Herbert E. Moore's estate, and that on the 16th day of May, A. D. 1900, and within four months before the filing of the petition in said bankruptcy proceedings the said Herbert E. Moore was insolvent, and was then and there owing the said defendant a large sum of money, to wit, three hundred dollars, and the said defendant was then and there surety upon two promissory notes to the amount, to wit, three thousand dollars, signed by the said Moore as principal, and the said Moore then and there, with a view to give preference to said defendant did transfer and deliver to said defendant a great quantity of goods and chattels, to wit, eight horses, seven buggies, two phætons, three surries, one express wagon, one lumber wagon, seven sleighs, two sets double driving harnesses, nine single harnesses, four street blankets, seven black Jap robes, six heavy fall lap robes, twenty summer robes, ten carriage mats and six whips, all of the value of fifteen hundred dollars. And the plaintiff avers that the said defendant

at the time of said transfer and delivery to said defendant,
4 had reasonable cause to believe that said transfer and delivery to the defendant was intended to give a preference to said defendant over the other creditors of the said Moore and were in fraud of the laws relating to bankruptcy.

And the plaintiff avers that thereafterwards, to wit, on the first day of June, A. D. 1900, at St. Johnsbury aforesaid, the defendant transferred, sold and converted to his own use said goods and chattels and has not since had possession or control thereof. Whereby and by virtue of the statute in such cases made and provided an action hath accrued to the plaintiff as trustee to have and recover of the defendant the value of said goods and chattels, to wit, fifteen hundred dollars.

Yet the defendant, though often requested hath never paid said sum nor any part thereof, but detains it and wholly neglects and refuses to pay said sum.

To the damage of the plaintiff two thousand dollars, for the recovery of which, with just costs, the plaintiff brings suit.

As by said writ and declaration, referred to, on file appears.

And at the said June term, A. D. 1901, of said Caledonia county court, comes the said Henry Fairbanks, defendant, by Harry Blodgett, his attorney, and files a demurrer to the said declaration of the said plaintiff, which said demurrer filed in court on the 18th day of May, A. D. 1901 and now on file and referred to will more fully and at large appear.

And, upon hearing, it is adjudged, by the court, that the demurrer as to said second count be sustained and said second count adjudged insufficient.

And the said cause is ordered, by the court, to be continued to the December term, A. D. 1901, of said Caledonia county court.

And the plaintiff comes by his attorneys aforesaid and files specifications in the words and figures following:

5 *Plaintiff's Specifications.*

Henry Fairbanks debtor to Frank D. Thompson, trustee in bankruptcy of the estate of Herbert E. Moore, bankrupt, for cash received on June 11, A. D. 1900, from the sale of the following described property belonging to the said estate, viz., one chestnut horse called Tom, one gray mare called Mollie, one pair of chestnut mares called the Bailey & Jewett mares, one pair of bay mares called the Packard mares, one mare called Mattie, one mare called Mertie, one piano box buggy, one top buggy, Boston B. make, 3 corning top buggies, Boston B. make, one phaeton, with rubber tires, one two seat canopy top surr-y, with rubber tires, one two seated surr-y with steel tires, one two seated surr-y, one top buggy with rubber tires, one Concord buggy, one express wagon, one lumber wagon, one two seated sleigh, one top sleigh, four single sleighs, two set double driving harnesses,

nine single harnesses, four street blankets, seven black Jap robes, two gray robes, six heavy fall lap robes, twenty summer robes, ten carriage mats, six whips, $922.08.

FRANK D. THOMPSON, *Trustee.*

And the defendant also comes by Harry Blodgett, his attorney, aforesaid, and files his pleas in the words and figures following, viz.:— And now the said defendant comes and defends the wrong and injury when, &c., and says that he did not assume and promise, in manner and form, as the plaintiff in his declaration has alleged, and thereof puts himself on the country.

By his attorney, HARRY BLODGETT.

And the said defendant gives notice according to the form of the statute in such case made and provided, that upon the trial of said cause, he will give in evidence and rely upon in defence of said action, the following special matters: to wit: That said Herbert E. Moore in said writ mentioned, and upon whose estate said
6 plaintiff claims to be the trustee in bankruptcy on the 15th day of April, A. D. 1891, duly made, executed and delivered to the said defendant a chattel mortgage in writing and bearing the date aforesaid, whereby the said Moore sold and conveyed to the said defendant, "All my (his) livery property consisting of horses, wagons, sleighs, vehicles, harnesses, robes, blankets, etc., also all horses and other livery property that I (said Moore) may purchase in my (his) business, or acquire by exchange." Which said chattel was upon condition that "If I (the said Moore) well and truly pay or cause to be paid to the said Henry Fairbanks all that I (said Moore) now owe him or may owe him hereafter by note, book account, or in any other manner, and shall well and truly save said Henry Fairbanks harmless and indemnified from paying any commercial paper on which he has become or may hereafter become holden in any manner for my (said Moore's) benefit as surety, indorser, or otherwise, then this deed shall be void otherwise of force." And the said Herbert E. Moore and said Henry Fairbanks made an affidavit which was and is a part of said chattel mortgage in the words and figures following: "We severally swear that the foregoing mortgage is made for the purpose of securing the debt and other liability specified in the condition thereof and the contemplated loan and liability and for no other purpose whatever, and that the same is a just debt honestly due and owing from the mortgagor to the mortgagee, and the other liability is honest and the contemplated liability is for the honest purpose of enabling the grantor to raise money for use in his livery business." Which said affidavit was subscribed by said Moore and Fairbanks and each made oath to the truth of the same on the 17th day of April, A. D. 1891, before Alexander Dunnett, master in chancery.

That said chattel mortgage was thereafterwards on the 18th day of April, A. D. 1891, duly recorded in the town clerk's office of the

town of St. Johnsbury, where the said Herbert E. Moore then
7 and ever since has resided, and where said property was then situate, and which said chattel mortgage was on the 16th day of May, A. D. 1900, in full force and effect and had not been paid, cancelled, or discharged.

That said Herbert E. Moore was on said last named day at St. Johnsbury aforesaid, indebted to said defendant in the sum of, to wit: four hundred seventy-six and 63/100 dollars, and the said defendant had endorsed for said Moore and obligated himself to pay for said Moore a large sum of money, to wit: three thousand dollars, and said defendant on the 22nd day of May, A. D. 1900, did pay for said Moore a part of said obligation: to wit: five hundred twenty-six and 27/100 dollars to the First National Bank of St. Johnsbury, Vermont, for all which said indebtedness and obligations the said defendant was secured by said chattel mortgage.

That a part of which indebtedness, as aforesaid, had been long overdue on said 16th day of May, A. D. 1900, to wit: for the space of six months.

That the said defendant on the 16th day of May, A. D. 1900, at St. Johnsbury in the county of Caledonia, placed his said chattel mortgage in the hands of Lorenzo Sulloway, sheriff of Caledonia county, for the purpose of foreclosing the same, said Sulloway was then, and ever since has been, sheriff of Caledonia county, and the said Moore then and there consented that said Sulloway might take possession of said livery property for this defendant.

That said Moore then and there pointed out to said Sulloway the property covered by said mortgage, which is the same property named by the plaintiff in his specifications, and all said property named in said specification was on said 16th day of May, A. D. 1900, in the possession of said Moore, and a part of his livery property at St. Johnsbury aforesaid, and were the horses, and livery prop-
8 erty, described in said chattel mortgage, or that had been purchased by said Moore, or acquired by him in exchange, subsequent to the date of said chattel mortgage.

That said Moore then and there put said Sulloway in possession of all of said property named in the plaintiff's specification, and for which the plaintiff seeks to recover in this suit, and which was covered by said chattel mortgage to the defendant: that said Sulloway remained in and held possession of all of said described property named in plaintiff's specification, under and by virtue of said chattel mortgage, and with the consent of said Moore, until the 11th day of June, A. D. 1900, when he sold the same at public auction with the consent of said Moore, at the livery stable of said Moore in St. Johnsbury in the county of Caledonia, said livery stable then and there being a public place in said town of St. Johnsbury. Said Sulloway having first on the 16th day of May, A. D. 1900, advertised said property for sale at public auction by posting a notification in two public places in said town of St. Johnsbury that the said named property, describing it, would be sold by him at pubic auction on

the 4th day of June, A. D. 1900, at ten o'clock in the forenoon, to satisfy said mortgage with legal costs, at the livery stable of H. E. Moore, on Main street, in the village and town of St. Johnsbury, at which time said Sulloway attended and adjourned said sale, to the 11th day of said June, at the same place and the same time in the day, by posting notifications as before set forth, at which last named time and place, said Sulloway attended and sold all of said property named in plaintiff's specification, as advertised at public auction upon said chattel mortgage, and applied the proceeds of said sale upon the said defendant's said mortgage indebtedness.

That all the said property named in the plaintiff's said specification, and for which he seeks to recover in this action: to wit:
9 "one chestnut horse called Tom, one gray mare called Mollie, one pair of chestnut mares called the Bailey & Jewett mares, one pair of bay mares called the Packard mares, one mare called Mattie, one mare called Mertie, one piano box buggy, one top buggy Boston B. make, 3 Corning top buggies Boston B. make, one phaeton with rubber tires, one old phaeton, one two seated canopy top surrey with rubber tires, one two seated surrey with steel tires, one two seated surrey, one top buggy with rubber tires, one Concord buggy, one express wagon, one lumber wagon, one two seated sleigh, one three seated sleigh, one top sleigh, four single sleighs, two sets double driving harnesses, nine single harnesses, four street blankets, seven black Jap robes, two grey robes, six heavy fall lap robes, twenty summer robes, ten carriage mats, six whips, $922.08," was and is the same identical property sold and conveyed in mortgage by said Moore to the defendant on said 15th day of April, A. D. 1891, and which was taken possession of by said Sulloway with the consent of the said Moore, for the defendant, under said mortgage, and was sold upon the mortgage, on the 11th day of June, A. D. 1900, with the consent of said Moore by said Sulloway, at public auction as herein before set forth as he had a legal right to do.

That said defendant causing the said named property to be sold upon his said mortgage with the consent of said Moore, as he had a legal right to do, as aforesaid, is all of the said several supposed promises and undertakings in the said plaintiff's declaration mentioned, whereby he has declared against the defendant and for which he seeks to recover in said suit.

By his attorney, HARRY BLODGETT.

And now at the December term, A. D. 1901, of said Caledonia county court, come the parties aforesaid by their respective attorneys aforesaid, and it is ordered by the court, by the consent of the parties, that the cause be referred to the determination of George M. Powers, Esq. who shall hear said cause and report to this
10 court. And day thereof is given &c.

And now at a term of the said Caledonia county court begun and held at St. Johnsbury, within and for the county of Caledonia, on the first Tuesday of December, A. D. 1902, come the par-

ties aforesaid by their respective attorneys aforesaid; and the said referee files in said court his report in the words and figures following, viz.:

Caledonia County Court, December Term, 1902.

FRANK D. THOMPSON, Trustee,
vs.
HENRY FAIRBANKS.

Porter & Thompson, attorneys for the plaintiff.
Harry Blodgett and Jonathan Ross, attorneys for the defendant.

To the hon. county court within and for the county of Caledonia:

The undersigned referee in the above entitled cause, respectfully reports that he met the parties and their counsel at the office of Porter & Thompson in St. Johnsbury on the 18th day of November, 1902, and first having been duly sworn, heard their evidence, and subsequently received and considered their respective requests for findings, and thereupon finds and reports the following facts:

The action is general and special assumpsit, but the plaintiff relies only upon the general counts. The plea is the general issue, with notice of special matter justifying under a sale under a chattel mortgage dated April 15, 1891.

At some time prior to the transactions hereinafter set forth, one Herbert Moore bought out a livery stock and business run by one Nettleton and wife in buildings owned by the defendant in St. Johnsbury village. Moore paid $2.750 therefor, about $800 in cash and the balance by assuming a mortgage then on the property held by one Maria Hill. Moore occupied the premises under the
11 Nettleton lease until its expiration, and then continued under a verbal lease at an increased rent until the sale of his livery property as hereinafter set forth.

Shortly before March 1st, 1888, Maria Hill died, and the defendant assisted Moore to pay off the claim held by her estate against the livery property, by signing a note with Moore for $1,425 dated March 1, 1888, on demand, and payable to the Passumpsic Savings Bank of St. Johnsbury. Moore gave the defendant a mortgage to secure this note, but it did not appear before me what it covered, and it cuts no figure in the determination of the issues in this case.

The defendant also signed a note with Moore for $350 dated July 15, 1890, and another for $500 dated May 5, 1891, both payable to said savings bank on demand. These three notes, with accrued interest, were merged in one dated March 1, 1900, for $2,510.75, due on demand, to said savings bank, signed by Moore, and by the defendant as surety. This note had not been paid when this case was heard before me.

The defendant also signed notes with Moore payable to the First National Bank of St. Johnsbury, as follows:

One dated June 22, 1886, for $750, which by payments made by Moore and sucessive renewals became one dated June 23, 1892, for $125; one dated May 21, 1889, which on Nov. 21, 1892, was reduced by Moore to $150; one dated Sept. 28, 1892, for $325.

These last three notes were merged in a note under date of Nov. 21, 1892, for $575 which was carried by the bank until May 21, 1898, when it was reduced by Moore to $525; and on June 4, 1900, it was paid by the defendant. These notes were all signed by the defendant to assist Moore in carrying on, building up and equipping his livery stable and livery business, and as between them belonged to Moore to pay.

12 On April 15, 1891, Moore gave the defendant a chattel mortgage on the livery property to secure him for these and other debts and liabilities; a certified copy of this mortgage, together with officer's return thereon (hereinafter referred to), marked "Pl'ff's Ex. 2, G. M. P." was received in evidence, without objection, and is attached hereto and made a part thereof.

On March 5, 1900, Moore gave the defendant another chattel mortgage on this livery stock, which on March 23, 1900, was assigned to said Passumpsic savings bank, which bank has ever since been the holder and owner thereof. A certified copy of this mortgage and assignment, marked "Pl'ff's Ex. 3, G. M. P." was received in evidence, without objection, and is attached hereto and made a part hereof.

On May 7, 1900, one John Ryan sued out a writ against Moore declaring therein in general assumpsit for $500 damages, and attached by one Worthen, deputy sheriff, this livery stock. This writ, with the officer's return thereon, marked "Pl'ff's Ex. 1, G. M. P." was received in evidence, without objection, and is attached hereto and made a part hereof. This attachment remained in force until dissolved by the bankruptcy proceedings hereinafter referred to, and the suit is still pending in this court.

At the time the chattel mortgage of April 15, 1891, was given by Moore to the defendant, it was agreed and understood by the parties to it, that Moore should sell or exchange any of the livery stock covered by it as he desired, and should thereby and by purchase or otherwise keep the stock good so that the defendant's security should not be impaired, and that all after-acquired livery property should be covered by the said mortgage as security for the debts specified therein. Pursuant to such understanding and agreement, Moore made sales, purchases and exchanges of livery stock to such an extent that on March 5, 1900, and May 16, 1900, there only remained of the livery property on hand April 15, 1891, two horses,

13 called Tom and Mattie, respectively. These sales, exchanges and purchases were made by Moore, sometimes without communication with or advice from the defendant, and frequently after consultation with him. The livery stock as it existed on May 16, 1900, was all acquired by exchange of the original stock or with the avails of the old stock sold or the money derived from the business;

there was more of it at this time that when bought by Moore, and its value had materially increased, but beyond the prices for which it sold as hereinafter set forth, there was no evidence before me on which I am able to find its fair cash value.

Some years after the mortgage of April 15, 1891, was given, Moore became embarrassed, and finally and shortly prior to March 5, 1900, he became and continued wholly insolvent.

On May 16, 1900, the defendant acting under the advice of his attorney Hon. W. P. Stafford, and with the consent of Moore, took possession under the mortgage of April 15, 1891, of all the livery property then on hand, and on June 11, 1900, caused the same to be sold at public auction by Lorenzo Sulloway, sheriff, as shown by the return on the mortgage hereto attached.

On June 30, 1900, Moore filed his voluntary petition in bankruptcy, and on July 3, 1900, was duly adjudged a bankrupt. The plaintiff was appointed trustee in bankruptcy of his estate Sept. 15, 1900, and duly accepted and qualified, and is acting as such.

It is for the net avails of the sale of June 11, 1900, as appears by the plaintiff's specification (including the amount received for the horses "Tom" and "Mattie," $42.50 and $26 respectively) amounting to $922.08 which the officer, Sulloway, paid over to the defendant as shown by said officer's return, that this suit is brought.

It is admitted that the plaintiff made a proper demand upon the defendant for this money before this suit was brought, and
14 that the defendant refused to pay it over and has ever since refused to do so; but the exact date of such demand and refusal did not appear. No question is made as to the regularity of the officer's proceedings in making this sale as shown by his return.

The Passumpsic savings bank, on Sept. 15, 1900, proved its said not- of $2,510.75 (which is specified in the condition of the mortgage of March 5, 1900, as one of the debts secured thereby) as an unsecured claim against the bankrupt estate of said Moore.

For the purpose of defeating the effect of the defendant's taking possession of the livery property under his chattel mortgage as aforesaid, this plaintiff brought petition to the United States district court, Wheeler, J., for leave to enter as plaintiff in the Ryan suit and to have the lien of Ryan's attachment preserved for the benefit of the general creditors; this petition was dismissed by that court. I find the facts covered by this paragraph upon the evidence of a certified copy of the record of that petition and the proceedings under it, which was admitted in evidence subject to the plaintiff's objection and exception; which certified copy is hereto attached and made a part hereof. The defendant had never taken possession of this livery property prior to May 16, 1900, and at this time there were horses, harnesses and vehicles of other parties in the stable, mixed with Moore's property so that it would not be possible from the mortgage unaided by Moore, or some person having knowledge, to pick out the mortgaged property; but with such aid the officer had no difficulty in selecting the mortgaged property. Some little

time before the defendant took possession of the livery property under his mortgage as aforesaid, and about the time the mortgage of March 5, 1900, was given, Hon. Alexander Dunnett, counsel for Moore, talked with the defendant about Moore's solvency. Mr. Dunnett was anxious lest the defendant should interfere with the
15 continuance of Moore's business if the mortgage of March 5, 1900, was allowed to stand, and told the defendant how Moore's financial affairs then stood, that he owed about $4,000 and had assets of about $2,000, and referred to Moore's going through bankruptcy. Mr. Dunnett also talked with Mr. Stafford, with whom all the legal questions involved in these matters had been intrusted by the defendant, in regard to the defendant's security, and the possibility of Moore's going into bankruptcy.

From the defendant's general acquaintance with Moore's affairs and of the undischarged attachment in the Ryan suit and the conversations with Mr. Dunnett, I find that the defendant and his counsel knew when he took possession of the livery property under his mortgage as aforesaid, that Moore was insolvent and was considering going into bankruptcy. I make this finding as to Mr. Stafford's knowledge of Moore's financial condition on the evidence of Mr. Dunnett as to conversations which he had with Stafford, which was received subject to the defendant's objection and exception.

When the defendant took possession of the livery property under his mortgage as herein set forth, he did not intend to perpetrate any actual fraud on the other creditors or any of them, but he did intend thereby to perfect his lien on the livery property and make it available for the payment of his debt before other complications by way of attachment or bankruptcy arose. And he understood at that time that it was probable that the Ryan attachment would hold good against his mortgages. All the property of which he took possession, was acquired by Moore with the full understanding and intent that it should be covered by the defendant's mortgage of April 15, 1891. In reaching this conclusion I consider the
16 testimony of Moore to that effect, which was received under the plaintiff's objection and exception.

Dunnett and Moore consented that the defendant might take possession of the property as above set forth, but the arrangement in reference thereto was made between Dunnett and Stafford, attorneys as aforesaid. By this arrangement the property was to be sold and the avails held by the officer in place of the property for whoever turned out to be entitled thereto, and neither Moore nor his counsel consented that the avails of the sale might be applied on the defendant's debts. Mr. Stafford asked Harland B. Howe, attorney for Ryan in the attachment, to consent to this arrangement, but he refused, claiming the attachment to be good against the mortgages.

At the time the defendant took possession of the livery property (May 16, 1900) he furnished the officer, Sulloway, a statement of his

account against Moore as he then claimed it to be; this statement is shown in the officer's return hereto attached, and exclusive of the $525 note above referred to, which was not due or paid until after the defendant so took possession, shows a balance then due the defendant of $435.95. The debtor side of this account contained, in addition to the charge for the stipulated rent of $15 per month, two charges amounting to $76.98 for extra horses kept by Moore on the rented premises. The defendant claims that Moore agreed to pay fifty cents per month for each horse kept in the stable above the stipulated number; Moore denies this. From all the evidence before me, I am unable to find this agreement to pay the extra price made out by a fair balance of evidence and therefore find that these charges are not legitimate. On the credit side of this statement, the defendant allowed a payment of $40 and interest thereon. I find that on July 21, 1890, Moore paid the defendant $60 and took from him a receipt of which the following is a copy:

17 ST. JOHNSBURY, VT., *July* 21, 1890.

Received of Herbert Moore sixty dollars on account of advance rent of stable to be accounted for with interest in final settlement.

(Signed) HENRY FAIRBANKS.

$60.

This $60 has never been accounted for by the defendant and amounted on May 16, 1900, with simple interest to $95.44.

December 6, 1898, Moore paid the defendant a check of $30 on account of his rent of the barn and this has not been accounted for; and with interest, amounted on May 16, 1900, to $32.60.

Disallowing the above charges of extra rent, readjusting interest on the debtor side accordingly, and allowing Moore these two items of credit, with interest, the open account between Moore and the defendant stood on May 16, 1900, with a balance of $269.19 due the defendant.

The amount paid by the defendant June 4, 1900, on the $525 note was $526.27; and the note for $2,510.75 with interest thereon was outstanding.

The question of what judgment should be rendered herein, and all questions of law involved, are respectively referred to the court.

I find also that the defendant was at the livery stable from 1891 to the time he took possession, frequently and generally as often as once in two or three weeks, and observed and knew of the changes that were being made in the property and that it was being kept up by Moore as he has agreed with the defendant.

Respectfully submitted.

GEO. M. POWERS, *Referee.*

18 And the defendant comes by his attorneys aforesaid and files exceptions to the said report in the words and figures following, viz.:

Defendant's Exceptions to Referee's Report.

And now comes the defendant and excepts to the referee's report in said cause, for the reason that the referee received in evidence and considered the testimony of Alexander Dunnett against defendant's objection and exception as to conversations that he had with Mr. Stafford as to Moore's financial condition at about the time the defendant took possession of the livery property, and upon which evidence the referee bases his finding "that the defendant and his counsel knew when he took possession of the livery property under his mortgage as aforesaid, that Moore was insolvent and was considering going into bankruptcy."

By his attorneys, HARRY BLODGETT AND
JONATHAN ROSS.

And at the same term of the said court the court renders judgment in the words following: "Judgment, *pro forma*, and without hearing, sustaining the defendant's exceptions to the report of the referee, and for the defendant to recover his costs. Exceptions by the plaintiff."

And plaintiff having prayed that he may be allowed exceptions to the judgment and decision of the court in this cause, and said exceptions, having been duly assigned and allowed, it was thereupon ordered by the court that execution of its judgment in this cause be stayed, and that said judgment be passed for revision and final determination to the honorable supreme court then next to be held at Montpelier, in the county of Washington, on the second Tuesday of May, A. D. 1903.

19 And at the term of the supreme court aforesaid, to wit, on the day and year last aforesaid, said cause is duly entered in this court, and the parties come by their respective attorneys to be heard upon the exceptions of the plaintiff as in his bill, now here remaining on file, fully and at large doth appear.

Whereupon the parties having been fully heard as well the plaintiff as the defendant upon said judgment and exceptions, and mature deliberation being thereupon had,

It is considered and adjudged by the court here, that in the judgment of and decision of the honorable county court in this cause there was not error, and that said judgment be in all things affirmed and stand in full force and effect.

And it is thereupon adjudged by the court that the said defendant have and recover of the said plaintiff his costs here taxed and allowed at the sum of nineteen and 33/100 dollars, for which said sum the said defendant may have execution against the said plaintiff.

Execution issued this — day of —— A. D. 19—, returnable in sixty days.

A true record.

Attest: ALBRO F. NICOLS, *Clerk.*

20 FRANK D. THOMPSON, Trustee, *vs.* HENRY FAIRBANKS. } Pending in Caledonia County Court.

Plaintiff's Exceptions.

In the above entitled cause the writ, defendant's plea and notice, plaintiff's specifications, report of referee, defendant's exceptions thereto and all of the exhibits are referred to and made a part hereof. Judgment *pro forma*, and without hearing, sustaining the exceptions to the report, and for the defendant to recover his costs. To all of which the plaintiff excepted.

Exceptions allowed, execution stayed and cause passed to the supreme court.

JOHN H. WATSON,
Presiding Judge.

(Indorsed:) Frank D. Thompson, trs., *vs.* Henry Fairbanks. Caledonia county court. Plaintiff's exceptions. Filed March 25, 1903. George L. Hunt, deputy clerk.

21 *Exhibits Referred to in and Made a Part of the Referee's Report and Plaintiff's Exceptions.*

PL'FF'S EX. 1, G. M. P.

STATE OF VERMONT, *Caledonia County,* } ss:

To any sheriff or constable in the State, Greeting:

By the authority of the State of Vermont, you are hereby commanded to attach the goods, chattels, or estate of Herbert E. Moore of St. Johnsbury in the county of Caledonia to the value of six hundred dollars, and notify him thereof according to law; and also notify him to appear before the county court at St. Johnsbury, within and for the county of Caledonia, and also to notify him to cause his appearance herein, to be entered with the clerk of said court, on or before the expiration of forty-two days from the date hereof, then and there in said court to answer to John H. Ryan of St. Johnsbury in the county of Caledonia, in a plea of the case, for that the defendant heretofore, to wit: on the 5th day of May, A. D.

1900, at St. Johnsbury in the county of Caledonia was indebted to the plaintiff in the sum of five hundred dollars, for work and labor, care and diligence of the plaintiff done, performed and bestowed, and for materials for the same, provided before that time, in and about the business of and for the defendant by the plaintiff and at the defendant's special instance and request and, also, in the like further sum of money, for divers goods, wares, merchandise and chattels before that time sold and delivered to the defendant by the plaintiff, and at the defendant's like special instance and request; and, also, in the like further sum of money, for money before that time, lent and advanced to the defendant by the plaintiff, and at the defendant's like special instance and request; and, also,
22 in the like further sum of money, for other money, before that time paid, laid out and expended for the defendant by the plaintiff, and at the defendant's like special instance and request; and, also, in the like further sum of money, for other money by the defendant before that time had and received for the use of the plaintiff; and, also, in the like further sum of money, found to be due from the defendant to the plaintiff, upon an account due before that time stated between them; and, also, in the like further sum of money due from the defendant to the plaintiff for the use and occupation of a certain messuage, tenement and premises, buildings, farm and lands, with the appurtenances, of the said plaintiff by the said defendant at his special instance and request, and by the sufferance and permission of the said plaintiff for a long time before then elapsed, had, held, used, occupied, possessed, and enjoyed; and in consideration thereof, then and there undertook and faithfully promised the plaintiff to pay the plaintiff the several sums of money in the count mentioned, when thereunto afterwards requested. Yet though often requested, the defendant has never paid the same, but wholly neglects and refuses so to do.

To the damage of the plaintiff five hundred dollars, for the recovery of which, with just costs, the plaintiff brings suit.

And you are further commanded to summon Dr. J. E. Hartshorn and Fred S. Harriman of St. Johnsbury in the county of Caledonia, trustee of the said defendant, to appear before said court at the time and place aforesaid, and make disclosure, according to law, of the goods, chattels, rights or credits of the said defendant which the said trustee may have in his or their or either of their hands or possession, and also notify them to cause their appearance herein to be entered as the law requires.

Fail not, but service and return make within 21 days from the date hereof.

23 Dated at St. Johnsbury, in the county of Caledonia, this 7th day of May, A. D. 1900.

ALBRO F. NICHOLS, *Clerk.*

Harland B. Howe recognized to the defendant and to each of the above named trustees in the sum of twenty dollars, as surety for the costs of prosecution, as the law directs.

Before me,

ALBRO F. NICHOLS, *Clerk.*

STATE OF VERMONT, *Caledonia County,* } ss:

At St. Johnsbury this 7th day of May, A. D. 1900, I then served this writ on the within named trustee F. S. Harriman by delivering to him a true and attested copy of the original writ and my return hereon thereon endorsed, and on the 8th day of said May I made further service of the same on the within named trustee, J. E. Hartshorn, by leaving for him a true and attested copy of the original writ at the house of his then usual abode in the hands of Mrs. Gilbert E. Woods, a person of sufficient discretion to receive the same, and on the same day I made further service of the same by attaching as the property of the within named defendant one white mare called Mollie, one pair of chestnut mares known as the Bailey and Jewett mares, one chestnut horse with one eye, called Tom, one chestnut mare called Mattie, one bay mare called Mertie, one pair of bay horses called the Packard horses, six white shoats weighing about one hundred and fifty pounds each, two piano top buggies manufactured by the Boston Buck-Board Company, two two-seated wagons manufactured by the Boston Buck-Board Company, four Corning top buggies, with end springs manufactured by the Boston Buck-Board Company, one open Concord wagon painted yellow, one top phaeton with rubber tires, manufactured by the Boston Buck-Board Company, one lumber wagon, five rubber trimmed driving harnesses, five nickel trimmed driving harnesses, one pair rubber trimmed driving harnesses, one pair nickel trimmed driving harnesses, five single sleighs, one two seated sleigh, two white fur robes, ten black fur robes, four heavy street blankets, fifteen light lap robes, one stallion with white face called Corbett, all said property now in the possession of the said defendant at the livery stable now occupied by him, situated on the east side of Main street, in said St. Johnsbury, also, three yearling colts described as follows, two of last mentioned colts being bay color, and one of said colts being chestnut color, and fifteen shoats weighing about one hundred and fifty pounds each, the said last mentioned colts and said last mentioned shoats now in the possession of the said defendant on the farm now occupied by him situated on the highway leading from St. Johnsbury to North Danville, in the said town of St. Johnsbury, also one two seated wagon now in the possession of John H. Ryan, at his factory on Railroad street, in said St. Johnsbury, and on the same day I lodged a true and attested copy of this attachment in the town clerk's office in the town of St. Johnsbury, and this my return hereon thereon indorsed, and on the 9th day of May, at St. Johnsbury, in

24

the county of Caledonia, I gave the defendant a true and attested copy of the original writ, and a list of the personal property so attached, and this my return hereon, thereon indorsed.

Attest: W. H. WORTHEN,
Deputy Sheriff.

4 copies	$5.00
4 miles	.40
Town clerk	.25
	$5.65

(Indorsed:) No. 1201. John H. Ryan *vs.* Herbert E. Moore & Trs. Caledonia county court. Dated May 7, 1900. 21 days expires May 28, 1900. 42 days expires June 18, 1900. Harland B. Howe, att'y. Entered and docketed this 9th day of May, A. D. 1900. Rolfe Cobleigh, deputy clerk.

25 PL'FF'S EX. 2, G. M. P.

Mortgage Deed, Personal Property.

Herbert E. Moore
to
Henry Fairbanks.

Know all men by these presents: That Herbert E. Moore of St. Johnsbury in the county of Caledonia and State of Vermont, in the consideration of one thousand dollars paid to my full satisfaction by Henry Fairbanks of St. Johnsbury in the county of Caledonia and State of Vermont, by these presents do sell and convey to the said Henry Fairbanks and his assigns forever, the following described articles of personal property, viz:

All my livery property consisting of horses, wagons, sleighs, vehicles, harnesses, robes, blankets, etc., also all horses and other livery property that I may purchase in my business or acquire by exchange.

Warranted free from encumbrance and against any adverse claims except prior claims to said Henry Fairbanks.

Upon condition that if I well and truly pay or cause to be paid to the said Henry Fairbanks all that I now owe him or may owe him hereafter by note, book account, or in any other manner and shall well and truly save the said Henry Fairbanks harmless and indemnified from paying any commercial paper on which he has become or may hereafter become holden in any manner for my benefit as surety, endorser or otherwise, then this deed shall be void, otherwise of force.

In witness whereof I hereunto set my hand and seal this 15th day of April, A. D. 1891.

HERBERT E. MOORE. [L. S.]

In presence of

ALBRO F. NICHOLS.
ALEXANDER DUNNETT.

STATE OF VERMONT, } ss:
Caledonia County, }

26 At St. Johnsbury this 15th day of April, A. D. 1891, Herbert E. Moore personally appeared, and acknowledged this instrument, by him sealed and subscribed, to be his free act and deed.

Before me,

ALEXANDER DUNNETT,
Master in Chancery.

We severally swear that the foregoing mortgage is made for the purpose of securing the debt and other liability specified in the condition thereof and the contemplated loan and liability and for no other purpose whatever, and that the same is a just debt honestly due and owing from the mortgagor to the mortgagee, and the other liability is honest and the contemplated liability is for the honest purpose of enabling the grantor to raise money for use in his livery business.

HERBERT E. MOORE. HENRY FAIRBANKS.

STATE OF VERMONT, } ss:
Caledonia County, }

I hereby certify that the foregoing affidavit was subscribed and sworn to by Herbert E. Moore and Henry Fairbanks this 17th day of April, A. D. 1891.

Before me,

ALEXANDER DUNNETT,
Master in Chancery.

St. Johnsbury, town clerk's office.

APRIL 18, A. D. 1891, at 8 o'clock a. m. received the deed of which the foregoing is a true record.

Attest: E. D. BLODGETT, *Town Clerk.*

St. Johnsbury, town clerk's office.

THIS 3D DAY OF SEPTEMBER, A. D. 1901.

I hereby certify the within to be a true copy of record of mortgage deed of personal property as found in Book No. 3, on page 131, chattel mortgage records of St. Johnsbury.

Attest: E. D. BLODGETT, *Town Clerk.*

27 Return of sheriff's sale of mortgage property recorded in Book 3, page 131, personal property, Henry Fairbanks *vs.* Herbert E. Moore.

STATE OF VERMONT, } ss:
Caledonia County, }

ST. JOHNSBURY, *May 16th*, 1900.

By virtue of this mortgage and by the direction and consent of the mortgagor and the mortgagee I took possession of the following described property as pointed out by the mortgagor as the property covered by this mortgage, to wit: one chestnut horse called Tom, 1 gray mare called Mollie, 1 pair chestnut mares called the Bailey & Jewett mares, 1 pair bay mares called the Packard mares, 1 mare called Mattie, 1 mare called Mertie, 1 piano box buggy, Calland make, 1 top buggy Boston B. make, 3 Corning top buggies same make, 1 phaeton rubber tire, 1 old phaeton, one two seated canopy top surrey, rubber tires, B. B. make, new last year, 1 two seated surrey, same make, steel tires, just repaired, 1 two seated surrey same make, new 3 years ago, 1 single top buggy, Union Carriage Co., rubber tires, 1 Concord buggy, 1 express wagon, 1 lumber wagon, 1 two seated sleigh, 1 three seated sleigh, 1 top sleigh, 4 single sleighs, 2 set- double driving harnesses, 9 single harnesses, 4 street blankets, 7 black Jap robes, 2 grey robes, 6 heavy fall lap robes, 20 summer robes, 10 carriage mats, 6 whips, and on the same day I advertised the same for sale at public auction as the law directs by posting up a notification in two public places in said town that the same would be sold by me at public auction on the fourth day of June, A. D. 1900 at ten o'clock in the forenoon to satisfy said mortgage with legal costs at the livery stable formerly known as H. E. Moore livery stable on Main street in the village and town of St. Johnsbury, at which time and place I attended and adjourned said sale to the 11th day of June at the same place and the same time in the day by posting up notifica-
28 tions as before, at which last time and place I attended, and I then and there proceeded to sell said property as advertised, and I sold of said property to Ernest Morrill as follows, the horse called Tom for $42.50, the Bailey & Jewett horses for $82.50, the Packard mares for $87.00, the gray mare Mattie for $51.00, one

phaeton for $100.75, 1 buggy for $18.00, the Concord buggy for $10.00, 1 buggy for $18.00, 1 buggy for $17.00, 2 lap robes for 85 cents, 4 mats for 80 & 1.95, 2 street blankets, $3.25, 5 black fur robes & 1 grey robe, 6 in all for $19.50, 4 single harnesses for $14.75, 1 pair double harnesses for $20.00, the express sleigh for $16.50, 2 single sleighs for $12.00, the top sleigh for $13.50, 6 whips for 40c. he being the highest bidder for the same, and I sold to R. B. Gammell 1 mare Mattie for $26.00, 1 surrey for $20.00, 1 sleigh for $20.00, 5 lap robes for $2.85, 2 mats for 15 cents, 3 single harnesses for $4.25, 1 pair double harnesses for $8.25, and to L. H. Lucas, the express wagon for $13.50, 2 lap robes for 30 cts., 1 harness for $2.50, 1 blanket, 30 cts., and to John Moore the mare Mertie for $29.00, and to G. Adkins 1 buggy for $15.50, to C. B. Weeks the old phaeton for $3.75, to Ellery Clark 1 canopy top surrey with pole for $94.00, (repaired Ryan wagon), 3 lap robes, $2.80, to Jared Peck, 1 lap robe for $1.35, to McMclain, 1 robe for 80 cts., W. F. Thomas 2 lap robes, 55 cts., to H. I. Woods 1 robe, 50 cts., and J. McLeod 1 robe $.25, to A. Gaffany 1 robe 20c. to George Gagnon 1 street blanket for $2.50 and 1 black fur robe for $4.00, to S. J. Lyon 1 grey robe for $3.00, to F. Thomas 1 g. robe 50 cts., to C. Varney 1 harness for $1.75, to L. Plant the lumber wagon for $1.00, to J. M. Allen 1 sleigh for $4.25, they being the highest bidders respectively for the same, and to Henry Fairbanks 1 buggy for $60.00, one for $125.00, one for $35.00, he being the highest bidder for the same; and out of the proceeds of said sales, which amounted in the whole to the sum of $1,016.95 *dollars*,
29 I applied in the first place to satisfy the legal costs and charges of said sales and the keeping and care of said property as per bill of fees hereto connected and also a lien for repairs upon one surrey to J. H. Ryan which amounted in the whole to the sum of $168.37, which sum is to be diminished by the amount received by me for the use and rental of said property while in my hands to the amount of $73.50 leaving the net cost and expenses of said sale and expenses to the amount of $94.87, which left a balance to be applied on this to the amount of $922.08, which I have paid over to Henry Fairbanks, the mortgagee on this mortgagee, and now on this 10th day of July, A. D. 1900, I have caused this my doings herein recorded in the town clerk's office in the town of St. Johnsbury where this mortgage is recorded.

Attest: LORENZO SULLOWAY, *Sheriff.*

Bill of Fees.

Travel	$.50
Advertising	2.00
Livery	11.00
Town clerk	1.00
Keeping horses	53.99
J. McGowan	31.00
Dr. Buss	10.50

N. E. Richards	9.13
Telephone	2.50
R. B. Gammell	10.00
H. Fairbanks, rent	10.00
J. H. Ryan, repairs	26.65
	$168.37

St. Johnsbury, town clerks office.

JULY 10, A. D. 1900.

Received for record at 9 o'clock 45 minutes a. m., and of which the foregoing is a true record.

Attest: E. D. BLODGETT, *Town Clerk.*

Memorandum.

Herbert E. Moore to Henry Fairbanks, Dr.

May 22, 1899.	To 13⅔ mos. rental $15	$204.90
	" 6 extra horses @ 50c	40.98
May 22, 1900.	To interest 1 year on $245.88	14.75
30 May 2, 1900.	" 12 mos. rental $15	180.00
	" 6 extra horses	36.00
May 22, 1900.	To paid protested note F. N. bank	526.27
		$1002.90
Feb'y 9, 1900.	By $40.00 and interest received	40.68
May 22, 1900.	Amount due	$962.22

St. Johnsbury, town clerk's office.

SEPTEMBER 4TH, A. D. 1901.

I hereby certify the foregoing to be a true copy of record as found in Book 5 on pages 539 and 540, chattel mortgage records, St. Johnsbury.

Attest: E. D. BLODGETT, *Town Clerk.*

31 PL'FF'S EX. 3, G. M. P.

Mortgage Deed, Personal Property.

Herbert E. Moore
to
Henry Fairbanks.

Know all men by these presents: That I Herbert E. Moore of St. Johnsbury in the county of Caledonia and State of Vermont in the consideration of three thousand dollars paid to my full satisfaction

by Henry Fairbanks of St. Johnsbury in the county of Caledonia and State of Vermont, by these presents do sell and convey to the said Fairbanks and his assigns forever the following articles of personal property, viz:

All my livery property consisting of horses, wagons, sleighs, vehicles, harnesses, robes, blankets, whips, &c., also all other livery property which I may purchase in my business or acquire by exchange; all said property now owned by me being situated at my stable in the village of St. Johnsbury on Main street. Also my stallion named "Corbett" kept at the same place.

Warranted free from encumbrance and against adverse claims except to said Fairbanks and a mortgage upon said "Corbett" to Harry L. Moore duly recorded.

Upon condition that if I pay or cause to be paid all indebtedness of every nature from me to said Fairbanks present and future and save him harmless and indemnified from and by reason of every liability he has already assumed or may hereafter assume for me by way of surety, endorser or otherwise and especially all that I may owe him by way of rentals and the liability he has assumed for me upon a note held by the First National Bank of St. Johnsbury for $525.00, dated Nov. 22, 1899, payable in six months to his order and endorsed by him, the proceeds of which note I have had, and any and all notes that may be given on renewal thereof, and the liability he has assumed for me upon a note held by the Passump-
32 sic Savings Bank of St. Johnsbury dated March 1, 1900, for $2510.75 signed by me and by him as surety and any renewal or renewals thereof, then this instrument shall be void otherwise of full force.

In witness whereof I hereunto set my hand and seal this 5th day of March, A. D. 1900.

HERBERT E. MOORE: [L. S.]

In presence of
WENDELL P. STAFFORD.

STATE OF VERMONT, *Caledonia County,* } ss:

At St. Johnsbury this 5th day of March, A. D. 1900, Herbert E. Moore personally appeared and acknowledged this instrument by him sealed and subscribed to be his free act and deed.

Before me,

WENDELL P. STAFFORD,
Master in Chancery.

We severally swear that the foregoing mortgage is made for the purpose of securing the debt and other liability specified in the conditions thereof and for no other purpose whatever and that the same is a just debt honestly due and owing from the mortgagor to the mortgagee and the other liability is honest and truly stated and the

contemplated loans and liability are honest and to be made and incurred for the purpose of enabling said Moore to obtain money to use in his livery business.

HERBERT E. MOORE. HENRY FAIRBANKS.

STATE OF VERMONT, }
Caledonia County, } *ss:*

I hereby certify that the foregoing affidavit was subscribed and sworn to by said Herbert E. Moore and Henry Fairbank this 5th day of March, A. D. 1900.

Before me,

WENDELL P. STAFFORD,
Master in Chancery.

St. Johnsbury, town clerk's office.

MARCH 5, A. D. 1900, at 4 o'clock — minutes p. m.

Received the deed of which the foregoing is a true record.

Attest: E. D. BLODGETT, *Town Clerk.*

St. Johnsbury, town clerk's office.

AUGUST 22ND, A. D. 1901.

33 I hereby certify the foregoing to be a true copy of record of mortgage as found in Book 5, page 34 of chattel mortgage records of this office.

Attest: E. D. BLODGETT, *Town Clerk.*

Assignment Personal Mortgage.

Henry Fairbanks
to
Passumpsic Savings Bank.

Know all men by these presents that I Henry Fairbanks of St. Johnsbury in the county of Caledonia and State of Vermont, in consideration of one dollar paid to my full satisfaction by the Passumpsic Savings Bank of St. Johnsbury in the county of Caledonia and State of Vermont do hereby assign, transfer and convey unto the said The Passumpsic Savings Bank, successor and assigns forever all my right, title, interest and estate in and unto the property conveyed by the within mortgage and all my rights and privileges under said mortgage.

In witness whereof I hereunto set my hand and seal this 23d day of March, A. D. 1900.

HENRY FAIRBANKS. [L. S.]

In presence of:
C. S. ADAMS.
W. S. BOYNTON.

STATE OF VERMONT, *Caledonia County,* } ss:

At St. Johnsbury this 23d day of March, A. D. 1900, Henry Fairbanks personally appeared and acknowledged this instrument by him sealed and subscribed to be his free act and deed.
Before me,

W. S. BOYNTON,
Notary Public.

St. Johnsbury, town clerk's office.

MARCH 23, 1900.

Received at 2 o'clock p. m. of which the foregoing is a true record.
Attest: E. D. BLODGETT, *Town Clerk.*

St. Johnsbury, town clerk's office.

AUGUST 22ND, A. D. 1901.

I hereby certify the within and foregoing to be a true copy of record of assignment of mortgage as found in Book 5, page
34 528, records of chattel mortgages &c. for town of St. Johnsbury.
Attest: E. D. BLODGETT, *Town Clerk.*

35 District Court of the United States, District of Vermont.

In the Matter of HERBERT E. MOORE, Bankrupt. In Bankruptcy.

A Petition for an Order to Preserve a Certain Lien.

Your petitioner Frank D. Thompson, trustee in the above entitled matter, respectfully represents to your honorable court that on the 15th day of April, A. D. 1891, a paper writing was signed and delivered by said Moore purporting to be a chattel mortgage of "all my livery property consisting of horses, wagons, sleighs, vehicles, harnesses, robes, blankets, etc., also all horses and other livery property that I may purchase in my business or acquire by exchange," purporting to convey all said livery property and after acquired property to one Henry Fairbanks of St. Johnsbury in the county of Caledo-

nia and State of Vermont, to secure all indebtedness then owing, or that might be owing from said Moore to said Fairbanks, and to secure said Fairbanks harmless from paying any commercial paper of said Moore on which he said Fairbanks, might become holden as surety or endorser.

Your petitioner further states that said instrument does not in any way describe said livery property other than is above stated, and does not state where said property was situated.

That on the 7th day of May, A. D. 1900, the said Moore had as livery property, in his livery stable at said St. Johnsbury the following described property, viz., one white mare called Mollie, one pair of chestnut mares known as the Bailey and Jewett mares, one chestnut horse with one eye, called Tom, one chestnut mare called Mattie, one bay mare called Mertie, one pair of bay horses called
36 the Packard horses, two piano top buggies manufactured by the Boston Buck-Board Company, one open Concord wagon painted yellow, four Corning top buggies with end springs manufactured by the Boston Buck-Board Company, two two-seated wagons manufactured by the Boston Buck-Board Company, one top phaeton with rubber tires manufactured by the Boston Buck-Board Company, one lumber wagon, one two seated wagon, five rubber trimmed driving harnesses, five nickle trimmed driving harnesses, one pair rubber trimmed driving harnesses, one pair nickle trimmed driving harnesses, five single sleighs, one two seated sleigh, two white fur robes, ten black fur robes, four heavy street blankets, fifteen light lap robes.

That all of said livery property with the exception of the horse called Tom and the mare called Mattie was acquired by the said Moore subsequently to the giving of the said paper writing purporting to be a chattel mortgage.

That your petitioner is advised and believes that under the laws of Vermont, on the said 7th day of May, A. D. 1900, said paper writing purporting to be a chattel mortgage was void and of no effect as against attaching creditors of said mortgagor.

That on the said 7th day of May, A. D. 1900, John H. Ryan of said St. Johnsbury prayed out a writ in his favor against said Moore returnable to the Caledonia county court, praying for an attachment to the amount of six hundred dollars. That said writ was duly served by attaching all of said livery property, and duly returned and entered in said court within twenty one days from the date thereof. That said suit is now pending in said Caledonia county court.

That on the 16th day of May, A. D. 1900, the said Henry Fairbanks by virtue of said chattel mortgage herein above mentioned, took possession of all of said livery property and advertised all of said livery property to be sold on the 4th day of June, A. D. 1900, to satisfy the claims of said Fairbanks against said bankrupt.
37 That said sale was continued until the 11th day of June, A. D. 1900, on which date all of said livery property was sold by

virtue of said chattel mortgage, and the proceeds of said sale received by said Fairbanks.

That on the 30th day of June, A. D. 1900, said Moore filed his petition in bankruptcy, that on the 3d day of July, A. D. 1900, said Moore was adjudged a bankrupt, and such proceedings were thereafter had that your petitioner was duly appointed trustee of the estate of said Moore in bankruptcy, accepted said trust, qualified, and is now discharging the duties of said appointment.

Your petitioner is advised and believes that the United States bankrupt act of 1898, and said proceedings in bankruptcy bar the further prosecution of said suit by the plaintiff therein and that said Ryan is prevented by said Moore having been adjudged a bankrupt from enforcing his rights under said attachment as against a lien attempted to be created by said chattel mortgage, and that your petitioner as trustee of the estate of said bankrupt is by section 67 of said act subrogated to and may enforce such rights of said Ryan as against said pretended chattel mortgage for the benefit of the estate of said bankrupt.

That your petitioner is advised and believes that under and by virtue of said section 67, your petitioner may by virtue of said act and permission of your honorable court enter as plaintiff in said suit and carry on and prosecute the same to final judgment, and secure the same benefits of said attachment as against said pretended chattel mortgage for said estate and all unsecured creditors which said plaintiff would have secured thereby if bankruptcy had not intervened.

Wherefore your petitioner prays that your honorable court will take this matter into consideration and grant your petitioner leave to enter and prosecute said suit, and make an order that the
38 rights under such attachment lien created by such attachment, shall be preserved for the benefit of the estate of said bankrupt in the hands of your petitioner.

FRANK D. THOMPSON, *Trustee.*

UNITED STATES OF AMERICA, }
District of Vermont. }

At St. Johnsbury in said district this 11th day of March, A. D. 1901, personally appeared Frank D. Thompson, and made oath that the allegations in the foregoing petition are true to the best of his knowledge, information and belief.

Before me,

DAVID E. PORTER,
Master in Chancery.

I, John H. Ryan of St. Johnsbury hereby accepts service of the foregoing petition of Frank D. Thompson, trustee in the matter of

Herbert E. Moore in bankruptcy and of due notice of the hearing thereon, and waive any further or different notice thereof.

Dated at St. Johnsbury this 11th day of March, A. D. 1901.

JOHN H. RYAN.

Facts Agreed on for This Hearing.

In 1885 Mr. Fairbanks purchased in the village of St. Johnsbury premises which had a livery stable on them. Herbert E. Moore the bankrupt who had worked for him applied to him to rent the stable and to aid him in purchasing the stock then in the stable. Mr. Fairbanks rented the stable and aided him by endorsing his paper to purchase the stock, and took as security the chattel mortgages of 1886, 1888, and 1891. The first two mortgages were given to enable him to remove two mortgages then on the property and the third to secure Mr. Fairbanks for the aid already furnished and to add to the stock in the stable. Mr. Moore continued to carry on the business in the stable under his lease with the aid of Mr. Fairbanks by endorsing until May 1900, when the sheriff took possession for Mr. Fairbanks under the mortgage and sold the property as shown by his return.

39 Mr. Moore had paid his bills promptly down to the spring of 1900.

Whether Mr. Fairbanks knew or ought to have known that he was insolvent when the sheriff took possession is a controverted question. During these years Mr. Moore had made changes in the stock by sale, exchange and new purchase, with the consent of Mr. Fairbanks and frequently on consultation as to the particular change contemplated.

John H. Ryan on May 8th attached the stock in the stable, and other stock as shown by his writ. This was shortly before Mr. Fairbanks had the sheriff take possession under his mortgage. Mr. Ryan claims there was due him balance on note and account Sept. 15, 1900, $304 and some cents. His suit was duly entered in Caledonia court and is there now pending. He will not prosecute his suit further, and he has not proved his debt. There are proved against the -state between 5000 and 6000 dollars. The one proved by Passumpsic savings bank for about $2600, Mr. Fairbanks is holden to pay.

Frank D. Thompson was duly chosen and appointed trustee in the bankruptcy proceedings. He found there was an unsettled deal between Mr. Moore and Fred C. Harriman who is one of the trustees in the Ryan suit and settled with him, and in addition of procuring Harriman to pay a note on which he was endorser at the Citizens' savings bank which had been proved against the estate, of $800, received $250 in cash which he now holds.

FRANK D. THOMPSON.
HENRY FAIRBANKS,
By his attorney, JONATHAN ROSS.

United States District Court, District of Vermont.

In re HERBERT E. MOORE, Bankrupt.

40 WHEELER, *J.*:

The laws of the State provide for chattel mortgages, and for verification of the debt by affidavit appended to the mortgage, and:

"SEC. 2255. If such mortgage is given to indemnify the mortgagee against liability assumed, or to secure the fulfilment of an agreement other than the payment of a debt due from the mortgagor to the mortgagee such liability or agreement shall be stated specifically in the condition of the mortgage, and the affidavit shall be varied as to verify the validity and justice of such liability or agreement."

April 15, 1891 the bankrupt, a liveryman, executed to Henry Fairbanks a mortgage with description of property as:

"All my livery property consisting of horses, wagons, sleighs, vehicles, harnesses, robes, blankets, etc., also all horses and other livery property that I may purchase in my business or acquire by exchange."

The condition was:

"If I well and truly pay or cause to be paid to the said Henry Fairbanks all that I now owe him or may owe him hereafter by note, book account or in any other manner, and shall well and truly save the said Henry Fairbanks harmless and indemnified from paying any commercial paper on which he has become or may hereafter become holden in any manner for my benefit as surety, endorser or otherwise, then this deed shall be void."

The affidavit was:

"We severally swear that the foregoing mortgage is made for the purpose of securing the debt and other liability specified in the condition thereof and the contemplated loans and liability and for no other purpose whatever, and that the same is a just debt, honestly due and owing from the mortgagor to the mortgagee, and the other liability is honest and the contemplated liability is for the
41 honest purpose of enabling the grantor to obtain money for use in his livery business."

May 8, 1900 John H. Ryan caused some of the originally mortgaged and the after acquired livery property, with some other property of the bankrupt to be attached by copy in the town clerk's office made by statute equivalent to possession, and caused one Harriman, a debtor of the bankrupt to be summoned as a trustee of the bankrupt, in a suit now pending to recover a debt of $304.00.

May 16, 1900 Fairbanks caused an officer under a State statute with consent of the bankrupt to foreclose the mortgage by taking possession of all the livery property on the mortgage, and advertising it, and June 4th selling it for $1,016.95, which after paying expenses of $94.87 was applied upon this account of debts secured by the mortgage:

"Herbert E. Moore to H. Fairbanks, Dr.

Settled to Mar. 31, 1898, by final payment to Oct., 1898.

May 22, 1899.	To 13¾ months rental @ $15	$204.90
	" 6 extra horses, 50c each.....	40.98
May 22, 1900.	" interest 1 year, $245.88	14.75
	" 12 months rental @ $15	180.00
	" 6 extra horses, 50c each.....	36.00
		$476.63
May 22, 1900.	Paid protested note at 1st. nat. bank	526.27
		$1002.90
Feb. 9, 1900.	By $40. and interest received.....	40.68
	Amount due May 22, 1900.....	$962.22"

The mortgagor was adjudged a bankrupt on his own petition July 3, 1900. The trustee has received $250.00 from the debtor summoned as trustee in Ryan's suit.

This is a petition by the trustee, on notice to, and appear-
42 ance by Fairbanks, for an order that Ryan's attachment may be preserved as a lien for the benefit of the estate in bankruptcy. It is held in this State that possession of after acquired property under a mortgage is good as of the date of the mortgage against an assignee in insolvency. Peabody *vs.* Landon, 61 Vt. 318. The object is to avoid the effect of Fairbanks' possession under his mortgage of the after acquired property. Being within four months of the bankruptcy the attachment is wholly void as to Ryan, and as to all others, unless so ordered to be preserved. Bankrupt act. sec. 67*f*. The lien can be only such as Ryan would have if it had not been avoided as to him by the bankruptcy proceedings, which would amount to only $304.00, the amount of his claim, and costs, and the costs would have to be paid to enforce the lien. His lien covered as well the debt of Harriman as the livery property; he could have but one satisfaction, and it can be preserved for the benefit of the estate for no more. As the trustee has received $250.00 there remains but $54.00 as the extent to which the lien can be preserved by the order sought. Whether the trustee can treat the lien as void in part and be entitled to have it preserved by order of court in part, or can only have it all one way or all the other, is not clear.

None of the debts or liabilities on which the mortgage was foreclosed appears to have existed till more than six years after the mortgage was given, and but $245.88 of it till well within four months before bankruptcy proceedings; and whether a chattel mortgage as such can be good to cover such wholly future debts or

liabilities, or be made good for that purpose by possession given under it as against a trustee in bankruptcy does not appear to have been settled. It would be good between the parties, and so would a pledge, at any time, but if what would make it good took place within four months of the bankruptcy proceedings it might
43 become wholly void by the bankrupt act, sec. 67*e*; and this foreclosure might be void as a levy "through legal proceedings," under 67*f*. The trustee might be embarrassed about enforcing the provisions of the act making the mortgage lien of the foreclosure proceedings void in his own name, and enforcing Ryan's lien by attachment, if it should be preserved here, in the sheriff's name, on the same property, at the same time.

The spirit of the bankrupt act does not lead to the destruction of lawful liens; and its provisions should not be used to displace one by another for the purpose of defeating it without good cause. Under the circumstances it is thought to be most proper and just that these liens be left to stand or fall upon their respective merits, in their several places.

Petition dismissed.

Clerk's office, U. S. district court, district of Vermont.

BURLINGTON, VT., *November* 27, 1901.

I hereby certify that the above and foregoing are true copies of petition for order to preserve a certain lien, agreed statement of facts and decision of court, *In re* Herbert E. Moore, bankrupt, now remaining on file in my office.

[L. S.] GEO. E. JOHNSON, *Clerk*.

44 STATE OF VERMONT, }
Caledonia County, } ss:

I, Albro F. Nichols, clerk of the supreme court of the State of Vermont for the county of Caledonia, which is a court of record, having a seal as hereto attached, do hereby certify that the foregoing is a true copy of the original record, and of plaintiff's exceptions and of exhibits therein referred to, in the cause entitled; Frank D. Thompson, trustee, *vs.* Henry Fairbanks, by said court heard and determined at a term thereof begun and held at Montpelier in the county of Washington, for the county of Caledonia, on the second Tuesday of May, A. D. 1903, as appears by the said original record, plaintiff's exceptions and exhibits, now remaining in the office of the clerk of said supreme court for the county of Caledonia, by me this day examined and herewith compared.

In testimony whereof, I have hereunto set my hand and affixed the seal of said supreme court at St. Johnsbury in the county of Caledonia and State of Vermont, this 5th day of September, A. D. 1903.

[Seal Supreme Court, State of Vermont.]

ALBRO F. NICHOLS, *Clerk*.

45 Supreme Court of Vermont, Caledonia County, May Term, 1903.

FRANK D. THOMPSON, Trustee in Bankruptcy of Herbert E. Moore, Bankrupt,
vs.
HENRY FAIRBANKS.

TYLER, MUNSON, START, WATSON, and HASELTON, JJ.

WATSON, *J.:*

Sometime before June 22, 1886, the bankrupt, Herbert Moore, bought a livery stock and business in St. Johnsbury village. In part payment therefor, he assumed a mortgage then outstanding on the property. The business then was and continued to be carried on in buildings leased of the defendant. Shortly before March 1, 1888, the defendant assisted Moore to pay the assumed mortgage by signing a note with him for $1425 payable to the Passumpsic Savings Bank of St. Johnsbury. Defendant also signed other notes with Moore,—one for $350 dated July 15, 1890, payable to the same bank, and two notes payable to the First National Bank of St. Johnsbury, one for $750 dated June 22, 1886, and one dated June 23, 1889. The sum for which this last note was given does not appear.

On April 15, 1891, Moore gave the defendant, as security, a chattel mortgage on the livery property, and it was recorded on the 18th day of the same month. The description of the property is "All my livery property consisting of horses, wagons, sleighs, vehicles, harnesses, robes, blankets, etc. Also all horses and other livery property that I may purchase in my business or acquire by exchange." The mortgage is conditioned for the payment of all that the mortgagor then owed the mortgagee, or might thereafter owe him, "by note, book account, or in any other manner." and for the saving of the mortgagee "harmless and indemnified from paying any commercial paper on which he has become or may hereafter become holden in any manner for my (the mortgagor's) benefit as surety, endorser or otherwise."

46

On May 5, 1891, defendant signed another note with Moore, payable to the Passumpsic savings bank, and on March 1, 1900 the three notes given to that bank by Moore with the defendant as signer, as before stated, were merged in a note of that date signed by Moore and by the defendant as surety, for $2510.75, payable to the bank on demand. This note has not been paid, and although specified in the condition of the mortgage assigned to the bank, as one of the debts secured thereby, it has been proved by the bank as an unsecured claim against the bankrupt estate. The defendant signed other notes with Moore from time to time, in renewal and otherwise, payable to the First national bank.

After deducting payments made on the notes to the last named

bank, the aggregate sum due thereon was put into a new note dated November 21, 1892, signed in the same way. This note, amounting to $526.27, was paid by the defendant on June 4, 1900. These notes were all signed by the defendant to assist Moore in carrying on, building up, and equipping his livery stable and livery business, and as between them belonged to Moore to pay.

On March 5, 1900, Moore gave the defendant another chattel mortgage on the livery stock. Later in the same month, this mortgage was assigned by the defendant to the Passumpsic savings bank, by which it has hitherto been held and owned. On May 7, 1900, one John Ryan, a creditor of Moore, issued his writ against him declaring in general assumpsit for $500 in damages, and caused the livery stock to be attached thereon. On the 16th. day of the same month,
47 the defendant acting under the advice of his attorney and with the consent of Moore, took possession under his mortgage of April 15, 1891, of all the livery property then on hand, and on the 11th. day of June following, he caused the same to be sold at public auction by a public officer in due form under the provisions of the statute. By arrangement between Moore's attorney and the defendant's attorney, the property was thus to be sold, and the avails held by the officer in place of the property for the one who should prove to be entitled thereto; but neither Moore nor his attorney consented that the avails might be applied on the defendant's debts. On the 30th day of June, Moore filed his voluntary petition in bankruptcy, he was adjudged a bankrupt thereon, and the plaintiff was appointed trustee in bankruptcy of the estate, and he is now acting as such.

The petition in bankruptcy was filed within four months after the giving of the mortgage assigned to the Passumpsic savings bank, hence that mortgage became null and void under the bankrupt law of 1898, sec. 67, *e*. For the purpose of defeating the effect of defendant's taking possession of the property under the mortgage, the plaintiff brought his petition to the court of bankruptcy under the provisions of sub-division *f* of that section, for an order that Ryan's attachment might be preserved as a lien on the property for the benefit of the estate in bankruptcy. But upon hearing, the petition was dismissed. Since the attachment was made within four months prior to the filing of the petition in bankruptcy, the lien created thereby could be preserved only by an order from that court for such purpose. Without such order the attachment, like the last named mortgage, became null and void. Section 67, *f*. With the bank's mortgage and the attachment thus invalidated the defendant's rights under his mortgage of April 15, 1891, stood the same as though there had been no subsequent
48 mortgage given, nor attachment made. It is urged that with the annulment of the attachment, the property affected by it passed to the trustee as a part of the estate of the bankrupt under the express provisions of *f*. There would be more force in this contention were it not for the provision that, by order of the

court, an attachment lien may be preserved for the benefit of the estate. If there is no other lien on the property, there can be no occasion for such order; for on the dissolution of the attachment, the property, unless exempt, would pass to the trustee anyway. It is only when the property for some reason may not otherwise pass to the trustee as a part of the estate that such an order is necessary. We think such is the purpose of that provision, and that unless the lien is thus preserved, the property, as in the case at bar, may be held upon some other lien and not pass to the trustee. *In re.* Sentenne & Green Co., 120 Fed. 436.

The question then arises whether the defendant by virtue of his mortgage and the taking possession of the property thereunder had a lien on the property taken and sold paramount to the rights of the plaintiff as trustee under the bankrupt law. The plaintiff contends that the defendant did not have a lien valid against creditors under that act, and he seeks to recover the amount received by the defendant from the sale of the property. The parties to the mortgage are described therein as of St. Johnsbury, etc. Beyond what may be inferred from this fact, there is nothing in the mortgage showing where the property was located.

The referee found that at the time this mortgage was given, it was agreed and understood by the parties thereto that the mortgagor should sell or exchange any of the livery stock covered by the mortgage as he desired, and should thereby and by purchase or otherwise keep the stock good so that the defendant's security should not be impaired; and that all after-acquired livery property should be covered by the mortgage as security for the debts specified therein; that pursuant to such understanding and agreement, the mortgagor made sales, purchases, and exchanges of livery stock to such an extent that on May 16, 1900, when the defendant took possession of the property under his mortgage, there only remained two certain horses of the property on hand at the time the mortgage was given; that these sales, exchanges and purchases were made by the mortgagor; sometimes without communication with or advice from the defendant, and frequently after consultation with him; that the livery stock as it existed when the defendant took possession of it was all acquired by exchange of the original stock or with the avails of the old stock sold, or the money derived from the business; and that all the property of which the defendant took possession was acquired by Moore with the full understanding and intent that it should be covered by the defendant's mortgage.

49

The plaintiff contends that the mortgage is void, because (1) the description of the property is insufficient; (2) in neither the condition nor the affidavit is the description of the debt as specific as the law requires; also that the mortgage was invalid as to the after-acquired property. However the law might be upon these questions if the mortgagor had retained possession of the property until after the filing of the petition in bankruptcy, there would seem to be but

little doubt regarding it as the case stands. The property expressly described in the mortgage was the mortgagor's livery property and the after-acquired property was, by the description, all horses and other livery property that he might purchase in his business or acquire by exchange. In principle there is no difference between a mortgage on such livery property with acquisitions by purchase or exchange to keep the property in quality and value equal to what it was when the mortgage is given, and a mortgage on a stock of
50 goods with acquisitions by purchase to keep the stock from depletion by sales in the common course of business. That the mortgage in question is good at common law between the parties to it, and that when the mortgagee took possession of the property under it with the consent of the mortgagor, it became a good and valid mortgage on the property including that acquired subsequent to the giving of the mortgage, except as against intervening rights of creditors or other third persons, if any, and that such property came under the cover and operation of the mortgage as of its date, are questions too well settled in this State to need further discussion. Peabody *vs.* Landon, 61 Vt. 318; 15 Am. St. Rep. 903; Rice's Assignees *vs.* Hulett, 63 Vt. 321; *In re* Allen's estate, 65 Vt. 392; McLoud *vs.* Wakefield, 70 Vt. 558.

It is found that when the defendant took possession of the property he knew that the mortgagor was insolvent, and was considering going into bankruptcy; that he did not intend to perpetrate any actual fraud on the other creditors or any of them; but that he did intend thereby to perfect his lien on the property and make it available for the payment of his debt before other complications by way of attachment or bankruptcy arose. He then understood that Ryan's attachment would probably hold good against his mortgage. There is no finding that the thus parting with the possession of the property by the mortgagor was with the purpose on his part to hinder, delay, or defraud his creditors, or any of them. Without a finding to this effect, it cannot be said that there was any invalid transfer of the property within the provisions of sec. 67, *e*, of the bankrupt law. Sabin *vs.* Camp, 98 Fed. 974.

The plaintiff further contends that such transfer constituted a preference within the meaning of that law. Sec. 60, subdivision *a*, declares what shall constitute a preference, and subdivision
51 *b* provides that if a bankrupt shall have given a preference within four months before the filing a petition, or after it is filed and before adjudication, "and the person receiving or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person." It is unnecessary, however, to determine whether the taking possession of the property by the defendant under this mortgage with the consent of the mortgagor was a preference under subdivision *a*. For if it was, it is not voidable by the trustee, under subdivision *b* unless the defendant

or his agent had reasonable cause to believe that it was intended thereby to give a preference. Pirie *vs.* Chicago Title & Trust Co., 182 U. S. 438, 45 L. Ed. 1171.

The mortgage under which the defendant acted was given more than seven years before the enactment of the bankrupt law. The case shows that possession was not taken until after the condition was broken, for it is found that at that time there was due the defendant on open account for rent overdue of $269.19. As a mortgage under the common law, when the condition was not duly performed, the whole title to the property vested absolutely at law in the mortgagee, subject to the mortgagor's right in equity to redeem the same as in the case of a mortgage of lands. 2 Story Eq. Jur. s. 1030; Wood *vs.* Dudley, 8 Vt. 430; Blodgett *vs.* Blodgett, 48 Vt. 32. And the defendant had the right to perfect his title against creditors of the mortgagor by taking possession of the property. Coty *vs.* Barnes, 20 Vt., 78.

There is no finding that the defendant or his agent had reasonable cause to believe that by the change of possession it was intended to give a preference. This fact must affirmatively appear. We cannot infer it from the other facts reported. Darby
52 *vs.* National Bank, 57, Vt. 370. The fair construction of the findings is that the parties were but carrying out the provisions of the contract of mortgage as it was well understood between them before the bankrupt act was passed, with a view to their respective rights under the contract, rather than any preference was intended by either. Nor does the property covered by defendant's mortgage pass to the trustee under the provisions of subdivision *f*, whereby all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him are deemed null and void in case he be adjudged a bankrupt, and the property affected thereby is deemed wholly discharged and released from such lien and passes to the trustee as a part of the estate.

The question of intent does not arise under these provisions, but to come within them the lien in question must have been obtained through legal proceedings within the prohibited period. It cannot be said that the creation of a lien is the same as the enforcement of one already created. Assuming that the taking and sale of personal property by a public officer upon a statutory chattel mortgage under the provisions of V. S. 2265–2268, constitutes a legal proceeding within the meaning of the above provisions of the bankrupt law, as was recently held by Wheeler, J., in the matter of Parker P. Ball, bankrupt, 123 Fed. 164, it does not follow that the mortgage lien is thereby rendered null and void; for instead of being a lien obtained through such legal proceedings, it is an existing lien by contract enforced by them.

As already seen, the defendant's lien under this mortgage at common law was one that gave him an absolute legal title afterforfeit-

ure, which occurred before possession was taken by him. But it was necessary that a change of possession be had to render his
53 title operative against the other creditors of the mortgagor. Tobias *vs.* Francis, 3 Vt. 425; Woodward *vs.* Gates, 9 Vt. 358; Rice's Assignees *vs.* Hulett, before cited. After forfeiture the defendant had the right to sell the property in satisfaction of his debts. Wood *vs.* Dudley, before cited; Jones Chat. Mort. s. 707; Freeman *vs.* Freeman, 17 N. J. Eq. 44. And the sale, being with the mortgagor's consent, operated as a formal foreclosure of his equitable right of redemption. Jones Chat. Mort., s. 709.

The construction of section 67, *f*, has recently been under consideration in the case of Metcalf *vs.* Barber, 187 U. S. 165. 9 Am. B. R. 36. In an opinion delivered by Mr. Chief Justice Fuller, the court said: "In our opinion the conclusion to be drawn from this language is that it is the lien created by a levy, or a judgment or an attachment, or otherwise that is invalidated, and that where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. When it is obtained within four months, the property is discharged thereupon, but not otherwise. A judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens. If this were not so, the date of the acquisition of a lien by attachment or creditors' bill would be entirely immaterial."

Nor is the case of Wilson *vs.* Nelson, 183 U. S. 191, 46 L. Ed. 147, upon which the plaintiff relies, to the contrary. There Nelson borrowed the sum of money before the bankrupt law was enacted, and gave his promissory note therefor with an irrevocable power of attorney executed by him attached thereto authorizing any attorney of a court of record in his name to confess judgment thereon after its maturity. After the passage of the bankrupt
54 act, the owner of the note caused judgment to be entered upon the note and the warrant of attorney. Upon this judgment an execution was issued and the same was levied on Nelson's goods which were subsequently sold, and the proceeds were applied in part payment of the judgment. These proceedings were wholly without Nelson's knowledge or consent. More than five days after the levy, but before the sale of the goods, a petition in bankruptcy was filed against Nelson, and the sole question before the court was whether he had committed an act of bankruptcy within the meaning of sec. 3, cl. 3, of the bankrupt law. In considering the case, the court discussed to some extent the provisions of sec. 67 subdivision *f*. In that case, unlike the one at bar, no lien existed upon the bankrupt's property until one was created by the levy of the execution, which brought it expressly within the terms of subdivision *f*. It is there said that the bankrupt act makes the result obtained by the creditor, and not the specific intent of the debtor, the essential fact; and that the levy, which was in a proceeding begun within the four

months, would be dissolved by the adjudication in bankruptcy because its existence and enforcement would work a preference; and it was held that the debtor, by failing to vacate or discharge the preference within five days before the sale of the property on the execution, committed an act of bankruptcy.

Some or all of the amount due from the mortgagor to the defendant for rent of buildings accrued after the giving of the mortgage, and the plaintiff contends that so much thereof as did thus accrue is not covered by the mortgage, because rent is not a "contemplated loan and liability" within the meaning of that expression in the affidavit attached to the mortgage. But when the defendant is considered as standing upon a mortgage at common law, no affi-
55 davit is necessary; and regarding the sufficiency of the description of the debts, obligations, and undertakings intended to be secured thereby, the rules governing similar questions arising in connection with real estate mortgages are applicable. Under the holdings of this court in cases involving such mortgages, it is clear that the description is sufficient in this regard. McDaniels *vs.* Colvin, 16 Vt., 300; Seymour *vs.* Darrow, 31 Vt. 122; Soule *vs.* Albee, 31 Vt. 142.

Nor can we agree with the plaintiff's contention that the defendant cannot avail himself of this security to save him harmless and indemnified from paying the note for $2510.75 at the Passumpsic savings bank, signed by him as surety, because the defendant's liability thereon is not more specially described in the mortgage. In this respect, the condition of the mortgage is more specific than the one before the court in Soule *vs.* Albee. There the condition was "should also pay all sums that the petitioners or A. G. Soule should become liable to pay for Curtis Albee in consequence of signing or otherwise." This condition was held sufficient to cover an agreement whereby the mortgagee, at the mortgagor's request, verbally agreed with the mortgagor's debtor, who had been summoned as a trustee in a suit against the mortgagor, that if said debtor would pay this debt to the mortgagor, he, the mortgagee, would pay him whatever judgment should be rendered against him as trustee in that suit.

Whether the description meets the requirements of the law regarding statutory chattel mortgages, we need not inquire. The defendant cannot be deprived of his security in that behalf, until the note at the bank has been paid or he has in some other manner been fully discharged or released as surety thereon.

In considering the questions before us, we have treated all evi-
dence introduced by the plaintiff, to which defendant ex-
56 cepted, as properly in the case without regard to its legal admissibility.

The *pro forma* judgment for the defendant to recover his costs is affirmed.

I hereby certify that the foregoing is a correct copy of the opinion of the supreme court of the State of Vermont in the case of Frank

D. Thompson, trustee in bankruptcy of Herbert E. Moore, bankrupt, *versus* Henry Fairbanks.

JOHN W. ROWELL,
Chief Judge of the Supreme Court of Vermont.

57 Supreme Court of Vermont, Caledonia County.

FRANK D. THOMPSON, Trustee in Bankruptcy of Herbert E. Moore, Bankrupt, Plaintiff,
vs.
HENRY FAIRBANKS, Defendant. } No. 1358.

Assignment of Errors.

Now comes the above plaintiff and says that there are errors in the record, proceedings, decision, and final judgment of the supreme court of the State of Vermont in the above entitled cause, and for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignment of errors:

1. The court erred in holding that the bankrupt's livery property did not pass to the plaintiff under section 70*a* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 565, 566; and in failing to hold that the bankrupt's livery property did pass to the plaintiff under section 70*a* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 565, 566.

2. The court erred in holding that the money obtained from the sale of the bankrupt's livery property on June 11, 1900, did not pass to the plaintiff under section 70*a* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 565, 566; and in failing to hold that the money obtained from the sale of the bankrupt's livery property on June 11, 1900, did pass to the plaintiff under section 70*a* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 565, 566.

3. The court erred in holding that the plaintiff could not recover the amount received by the defendant from the sale of the bankrupt's livery property on June 11, 1900, under section 70*e* of
58 the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 566; and in failing to hold that the plaintiff could recover the amount received by the defendant from the sale of the bankrupt's livery property on June 11, 1900, under section 70*e* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 566.

4. The court erred in holding that the defendant's chattel mortgage of April 15, 1891 was a valid lien against the bankrupt's estate under section 67*a* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 564; and in failing to hold that the defendant's chattel mortgage of April 15, 1891 was not a valid lien against the

bankrupt's estate under section 67*a* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 564.

5. The court erred in holding that the plaintiff was not subrogated to the rights of the Passumpsic savings bank and of John Ryan, creditors of the bankrupt, as against the defendant's chattel mortgage of April 15, 1891, and could not enforce said rights against said mortgage of April 15, 1891 for the benefit of said bankrupt's estate under section 67*b* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 564; and in failing to hold that the plaintiff was subrogated to the rights of the Passumpsic savings bank and of John Ryan, creditors of the bankrupt, as against the defendant's chattel mortgage of April 15, 1891, and could enforce said rights against said mortgage of April 15, 1891, for the benefit of said bankrupt's estate, under section 67*b* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 564.

6. The court erred in holding that upon Moore's being adjudicated a bankrupt under the provisions of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 544, chap. 541, the defendant's rights under his chattel mortgage of April 15, 1891, stood the same as though the mortgage of March 5, 1900 had not
59 been given to, and assigned by him, or the Ryan attachment of May 7, 1900 made.

7. The court erred in holding that the property covered by the Ryan attachment of May 7, 1900 did not pass to the plaintiff under section 67*f* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 565, upon Moore's being adjudicated a bankrupt.

8. The court erred in holding that the Ryan attachment of May 7, 1900 being made within four months prior to the filing of the petition in bankruptcy by Moore, the lien created thereby could be preserved for the benefit of the bankrupt's estate only by an order from the bankruptcy court for such purpose under section 67*f* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 565.

9. The court erred in holding, that, without an order from the bankruptcy court preserving the same, the attachment of Ryan's of May 7, 1900, became absolutely null and void upon Moore's being adjudicated a bankrupt, under section 67*f* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 565.

10. The court erred in holding that, upon Moore's being adjudicated a bankrupt, the property covered by the mortgage of March 5, 1900 did not pass to the plaintiff under section 67*e* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 564.

11. The court erred in holding that, upon Moore's being adjudicated a bankrupt, the mortgage of March 5, 1900 became absolutely null and void under section 67*e* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 564.

12. The court erred in holding that the defendant by virtue of his mortgage of April 15, 1891, and by taking possession of the livery property thereunder, had a lien on the said property so taken and sold paramount to the rights and title of the plaintiff under

the United States bankruptcy law of July 1, 1898, 30 Stat.
60 at L. 544, chap. 541.

13. The court erred in holding that the taking possession of the livery property of the bankrupt on May 16, 1900 by the defendant under his mortgage of April 15, 1891 brought said livery property under the cover and operation of said mortgage as of its date, for that said holding is in violation of and contrary to the provisions of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 544, chap. 541.

14. The court erred in holding that the taking possession of the bankrupt's livery property on May 16, 1900 by the defendant under his chattel mortgage of April 15, 1891 was not a transfer of property rendered null and void under section 67*e* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 574, upon the bankrupt's being adjudicated a bankrupt.

15. The court erred in holding that unless Moore parted with the possession of the livery property in question with a purpose on his part to hinder, delay or defraud his creditors, or any of them, his assent to the defendant's taking possession of said livery property would not constitute an invalid transfer thereof within the provisions of section 67*e* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 564.

16. The court erred in holding that unless there was a finding that Moore parted with the possession of the livery property in question with the purpose on his part to hinder, delay or defraud his creditors, or any of them, his assent to the defendant's taking possession of said livery property would not constitute an invalid transfer thereof within the provisions of section 67*e* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 564.

17. The court erred in failing to hold that the taking possession of the bankrupt's livery property on May 16, 1900 by the defendant under his chattel mortgage of April 15, 1891, was
61 a preference within the meaning of section 60*a* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 562.

18. The court erred in holding that the taking possession of the bankrupt's livery property on May 16, 1900 by the defendant under his chattel mortgage of April 15, 1891 was not a preference voidable by the plaintiff under section 60*b* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 562.

19. The court erred in holding that the taking possession of the bankrupt's livery property on May 16, 1900 by the defendant under the provisions of Vermont statute, sections 2265–2268, was not the obtaining of a lien through legal proceedings within the meaning of section 67*f* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 565.

Wherefore the said Frank D. Thompson, trustee in bankruptcy of Herbert E. Moore, bankrupt, plaintiff, prays that the errors complained of may be reviewed in the Supreme Court of the United

States, and the judgment of the supreme court of the State of Vermont in the above entitled cause be reversed.

FRANK D. THOMPSON,
Trustee in Bankruptcy of Herbert E. Moore, Bankrupt, Plaintiff,
By his attorneys, FRANK D. THOMPSON AND
DAVID E. PORTER.

STATE OF VERMONT, *Caledonia County,* } ss:

I hereby certify that the above and foregoing is a true copy of the original assignment of errors and prayer for reversal in the cause of Frank D. Thompson, trustee in bankruptcy of Herbert E. Moore bankrupt, *vs.* Henry Fairbanks, as filed in the clerk's office of the supreme court of the State of Vermont for the county of Caledonia on the 24th day of August, A. D. 1903.

[Seal Supreme Court, State of Vermont.]

ALBRO F. NICHOLS, *Clerk.*

62 Supreme Court of Vermont, Caledonia County.

FRANK D. THOMPSON, Trustee in Bankruptcy of Herbert E. Moore, Bankrupt, Plaintiff,
vs.
HENRY FAIRBANKS, Defendant. } No. 1358.

Petition for Writ of Error.

The petition of Frank D. Thompson, trustee in bankruptcy of Herbert E. Moore, bankrupt, respectfully shows that on the 30th day of July A. D. 1903, the supreme court of the State of Vermont rendered a final judgment in the above entitled cause in favor of said Henry Fairbanks, defendant, and against your petitioner, plaintiff, in which final judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of your petitioner, all of which will more in detail appear from the assignment of errors which is filed with this petition.

That the said supreme court of the State of Vermont is the highest court of the said State of Vermont in which a decision in this suit and this matter could be had.

Wherefore your petitioner prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the supreme court of the State of Vermont for the correction of errors so complained of, and for citation and supersedeas.

FRANK D. THOMPSON,
Trustee in Bankruptcy of Herbert E. Moore, Bankrupt,
By his attorneys, FRANK D. THOMPSON AND
DAVID E. PORTER.

63 The writ of error as prayed for in the foregoing petition is hereby allowed this 20th day of August, A. D. 1903, the writ of error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of five hundred dollars.

JOHN W. ROWELL,
Chief Judge of the Supreme Court.

[Endorsed:] Supreme court of Vt. Caledonia Co. Frank D. Thompson Tr. *vs.* Henry Fairbanks Petition for writ of error Filed Aug. 24, 1903 Albro F. Nichols clerk.

64 Supreme Court of the United States.

FRANK D. THOMPSON, Trustee in Bankruptcy of Herbert E. Moore, Bankrupt, Plaintiff in Error,
vs.
HENRY FAIRBANKS, Defendant in Error.

Bond.

Know all men by these presents, that we Frank D. Thompson, trustee in bankruptcy of Herbert E. Moore, bankrupt, as principal, and Elisha May and Fred G. Bundy as sureties, are held and firmly bound unto Henry Fairbanks in the full and just sum of five hundred dollars, to be paid to the said Henry Fairbanks, his executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of August in the year of our Lord one thousand nine hundred and three.

Whereas the above-named plaintiff in error seeks to prosecute his writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled cause by the supreme court of the State of Vermont,

Now, therefore, the condition of this obligation is such, that if the above-named plaintiff in error shall prosecute his said writ of error to effect, and answer all costs and damages that may be adjudged if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

FRANK D. THOMPSON, [L. S.]
Trustee in Bankruptcy of Herbert L. Moore, Bankrupt.
ELISHA MAY. [L. S.]
FRED G. BUNDY. [L. S.]

In presence of
A. W. SMITH.

65 STATE OF VERMONT, *Caledonia County,* } *ss:*

Elisha May and Fred G. Bundy, being duly sworn, on oath depose and say: We are each of lawful age and are citizens of the State of Vermont, and know the contents of the foregoing instrument to which we have attached our names. We each for himself say we are worth the sum of five hundred dollars over and above all debts, liabilities and exemptions.

ELISHA MAY.
FRED G. BUNDY.

Subscribed and sworn to before me this 24th dat of August, A. D. 1903.

DAVID E. PORTER,
Notary Public. [L. S.]

The above bond is approved.

JOHN W. ROWELL,
Chief Judge of the Supreme Court of the State of Vermont.

STATE OF VERMONT, *Caledonia County,* } *ss:*

I hereby certify that the above and foregoing is a true copy of the original bond in the cause of Frank D. Thompson, trustee in bankruptcy of Herbert E. Moore, bankrupt, plaintiff in error, *vs.* Henry Fairbanks, defendant in error, as filed in the clerk's office of the supreme court of the State of Vermont for the county of Caledonia on the 26th day of August, A. D. 1903.

[Seal Supreme Court, State of Vermont.]

ALBRO F. NICHOLS, *Clerk.*

66 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Vermont, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Vermont at the May term, A. D. 1903, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Frank D. Thompson, trustee in bankruptcy of Herbert E. Moore, bankrupt, plaintiff, *versus* Henry Fairbanks, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their

validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said plaintiff, Frank D. Thompson, trustee in bankruptcy of Herbert E. Moore, bankrupt, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme
67 Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 22d day of August, in the year of our Lord one thousand nine hundred and three.

[Seal Circuit Court, Vermont District, U. S. A.]

GEO. E. JOHNSON,
Clerk of the Circuit Court of the United States for the District of Vermont, in the Second Circuit.

Allowed by

JOHN W. ROWELL,
Chief Judge of the Supreme Court of Vermont.

[Endorsed:] Supreme Court of the United States. Frank D. Thompson, trustee in bankruptcy of Herbert E. Mo-re, bankrupt, plaintiff in error, *vs.* Henry Fairbanks, defendant in error. Writ of error. Filed Aug. 26, 1903. Albro F. Nichols, clerk.

68 STATE OF VERMONT, } ss:
Caledonia County, }

I, Albro F. Nichols, clerk of the supreme court of the State of Vermont for the county of Caledonia, do hereby certify that the foregoing writ of error was filed in the clerk's office of said supreme court on the 26th day of August, A. D. 1903, and also at the same

time and place, a copy thereof for the said defendant, Henry Fairbanks.

Witness my official signature and seal of office this 5th day of September, A. D. 1903.

[Seal Supreme Court, State of Vermont.]

ALBRO F. NICHOLS, *Clerk.*

69 UNITED STATES OF AMERICA, *ss:*

To Henry Fairbanks, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Vermont for the county of Caledonia, wherein Frank D. Thompson, trustee in bankruptcy of Herbert E. Moore, bankrupt, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John W. Rowell, chief judge of the supreme court of the State of Vermont, this 25th day of August, in the year of our Lord one thousand nine hundred and three.

JOHN W. ROWELL,
Chief Judge of the Supreme Court of Vermont.

STATE OF VERMONT, }
Caledonia County, } *ss:*

At St. Johnsbury in said county this 28th day of August, A. D. 1903, I made service of this citation and notice on the within named Henry Fairbanks by leaving at his last and usual place of abode, with one A. G. Corbett, an adult person and a resident therein of sufficient discretion to receive a true and attested copy of the original citation and notice for said Henry Fairbanks with my return hereon thereon endorsed.

Attest,

L. D. MILES,
Deputy U. S. Marshal.

Fees.

Service.....	2.00
Car fare to St. Johnsbury & return.....	2.70
	$4.70

70 Supreme Court of the State of Vermont.

OFFICE OF THE CLERK FOR CALEDONIA COUNTY.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto set my hand and affix the seal of said supreme court, at St. Johnsbury, in the county of Caledonia, this 5th day of September, A. D. 1903.

[Seal Supreme Court, State of Vermont.]

ALBRO F. NICHOLS, *Clerk.*

Costs of Suit.

Plaintiff's costs, { Co. ct. $28.21 / Sup. ct. $23.50

Defendant's costs, $19.33

Cost of transcript and serving citation, $18.06.

Endorsed on cover: File No. 19,070. Vermont supreme court. Term No. 117. Frank D. Thompson, trustee in bankruptcy of Herbert E. Moore, bankrupt, plaintiff in error, *vs.* Henry Fairbanks. Filed September 17th, 1903. File No. 19,070.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904

No. 117

FRANK D. THOMPSON
TRUSTEE IN BANKRUPTCY OF
HERBERT E. MOORE, BANKRUPT
PLAINTIFF IN ERROR

vs.

HENRY FAIRBANKS

IN ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT

Plaintiff's Brief on Defendant's Motion to Dismiss

EDWARD H. DEAVITT,
Attorney for Plaintiff

PLAINTIFF'S BRIEF ON DEFENDANT'S MOTION TO DISMISS.

ADDITIONAL STATEMENT OF CASE.

In addition to the facts contained in defendant's "Statement of Case" the following and additional facts were found by the referee:

1. That on May 7, 1900, one John Ryan, a creditor of the bankrupt, sued out a writ against the bankrupt, declaring therein in general assumpsit for $500.00, and attached all the bankrupt's livery stock, which attachment was in force until dissolved by bankruptcy proceedings *(Transcript of Record, p. 12.)*

2. That at the time the defendant took possession of the livery property on May 16, 1900, he not only knew that the bankrupt was insolvent, but he also knew of the Ryan attachment of May 7, 1900, knew that the bankrupt was contemplating going into bankruptcy, and he intended by taking possession of the livery property as he did to make it available for the payment of his debt before other complications by way of attachment or bankruptcy arose. *(Transcript of Record, p. 15.)*

There is no finding in the case that the bankrupt "consented that Fairbanks might take possession of the property, not with any intent to prefer him to other creditors, but because he understood that such was his legal right under the mortgage," but the referee did find that although the bankrupt consented that the officer might take and sell the property under the defendant's mortgage yet the arrangement was that the property

was to be sold, and the avails held by the officer in place of the property for whoever turned out to be entitled thereto, and that the bankrupt did not consent that the avails of the sale might be applied on the defendant's debt. *(Transcript of Record, p 16.)*

The Supreme Court of Vermont, however, ignored this finding of the referee in their decision of the case, but treated the case as though the bankrupt gave his full consent and assistance to everything that the defendant did in applying the property to the payment of his debt. *(Transcript of Record, pp. 50, 52, 53.*

ARGUMENT.

The defendant bases his motion to dismiss the plaintiff's writ of error upon the grounds:

1. That this court has no jurisdiction.
2. That no federal question is involved.

One of the class of cases in which United States Revised Statutes, Section 709, provides that the Supreme Court of the United States may review the judgments of State Courts is "where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority."

In this case if the plaintiff specially claimed any title or right by virtue of any statute of the United States, in the State Court, and the decision of the Supreme Court of Vermont, the highest court of that State, was against such title or right, a federal question is involved and this court has jurisdiction.

The plaintiff claims that the case at bar comes within the class of cases above cited, for that in the State Court he, as a Trustee in Bankruptcy of a bankrupt estate appointed and acting under the United States Bankruptcy Law of 1898, made special claim of title and right to a certain sum of money held by the defendant, the same being the avails of certain property formerly belonging to the bankrupt, taken and sold by the defendant within the four months preceding the filing of a petition in bankruptcy by the bankrupt, on the ground that under the provisions of the United States Bankruptcy Law of 1898, 30 Stat. at L. 544, chap. 541, he was entitled to the same as a part of said bankrupt's estate, and the decision of the Supreme Court of Vermont was against the plaintiff's said claim.

One of the plaintiff's claims in the Court below was that the defendant's taking possession of the livery property as he did on May 16, 1900, the same being within four months of the filing of the petition in bankruptcy by the bankrupt, constituted a preference voidable by the plaintiff under sections 60*a* and 60*b* of the United States Bankruptcy Law of 1898.

Another claim was that the defendant's taking possession of the livery property on May 16, 1900, with the consent and assistance of the bankrupt, was a transfer of property void under section 67*e* of the United States Bankruptcy Law of 1898.

Section 60*a* reads as follows:

> "A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his

creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

Section 60*b* reads as follows:

> "If a bankrupt shall have given preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person securing it, or to be benefitted thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

Section 67*e* provides that:

> "That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of this Act, and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or incumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors."

Section 3*b* of the Bankruptcy Act provides that a petition in Bankruptcy may be filed against a person who has committed an act of bankruptcy within four months after the commission of such act, and that such time shall not expire until four months after the date of the record-

ing or registering of the transfer or assignment, when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors, or for the purpose of giving a preference, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes, notorious, exclusive, or continuous possession of the property.

In *Wilson Brothers vs. Nelson, 183, U. S., 191*, this Court held that the Act of 1898 makes the result obtained by the creditor, and not the specific intent of the debtor, the essential fact in what constitutes a preference.

The Supreme Court of Vermont held that the defendant's mortgage of 1891 was a common law chattel mortgage, and that "it was necessary that a change of possession be had to render his title operative against the other creditors of the mortgagor." *(Transcript of Record, p. 52.)*

Although it is true in Vermont, that in the case of a common law chattel mortgage, or of a mortgage covering after acquired property possession of the property must be taken by the mortgagee to perfect his title as against the creditors of the mortgagor, but when possession is taken the property comes under the cover and operation of the mortgage as of its date, still the fact remains that such a mortgage does not become a good and valid mortgage as against the mortgagor's creditors until such possession is taken; that it is not until such possession is taken that the result sought to be secured by such a mortgage is obtained.

Before the State Court the plaintiff contended that construing the provisions of section 3*b* in connection with sections 60*a*, 60*b* and 67*e*, and taking into consideration the fact that the Bankruptcy Law of 1898 aimed at the

result obtained by a creditor from a transfer of his debtor's property, as against the plaintiff, a trustee in bankruptcy, under the Bankruptcy Law of 1898, the transfer of the livery property from the bankrupt to the defendant would date from the day the defendant took possession of the same, May 16, 1900, and not from the date of the mortgage, April 15, 1891.

The decision of the State Court that the taking possession of the property brought it under the cover and operation of the defendant's mortgage as of its date, April 15, 1891, as against the plaintiff, was therefore a decision against a right and title claimed under a United States Statute, and this Court has jurisdiction to review the same.

This same question has been before the Supreme Court of other states, viz., New York, Massachusetts and Missouri, and in each case it was held that the question was a federal question, and that the provisions of the Bankruptcy Law of 1898 governed the date of such transfers, irrespective of what the former holdings of those courts had been

Matthews vs. Hardt, (N. Y.) 79 App. Div. 570.
Tatman vs. Humphrey, 184 Mass 361.
Babbitt vs. Kelley, (Mo.) 70 S. W. Rep. 384.
Landis vs. McDonald, 88 Mo. App. 335.

The plaintiff also claimed in the State Court that as a matter of law there was a finding in the Referee's report that at the time the defendant took possession of the livery property on May 16, 1900, he had reasonable cause to believe that the bankrupt intended thereby to give him a preference, and that the bankrupt delivered

the property to him with the intent on his part to hinder, delay and defraud his other creditors. The decision of the Supreme Court of Vermont on those points was adverse to the plaintiff.

But even if this Court holds that the decision of the Vermont Court that the taking possession of the livery property by the defendant on May 16, 1900, brought it under the cover and operation of the mortgage as of its date, April 15, 1891, as against this plaintiff, is not the decision of a federal question, yet there is a federal question in the case which is necessary to its determination.

Section 67*a* of the Bankruptcy Law provides that, "Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

Section 70*a* provides that the trustee of the estate of a bankrupt, upon his appointment and qualification shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt to all "(5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

On May 7, 1900, several days before the defendant took possession of the livery property under his mortgage, one Ryan, a creditor of the bankrupt, placed an attachment upon all the bankrupt's livery property, and that attachment was good as against the defendant's mortgage.

Rice vs. Courtis, 32 Vt. 460.
Russell vs. Fillmore, 15 Vt. 130.
Kittredge vs. Freeman, 48 Vt. 62.

In the State Court the plaintiff claimed that as Ryan's attachment was rendered null and void, not by the bankrupt filing a petition in bankruptcy, but by the subsequent adjudication in bankruptcy, that at the time the petition was filed, and prior thereto, the defendant's chattel mortgage was not a valid claim as against the claim of Ryan, a creditor of the bankrupt, and the livery property was property which prior to the filing of the petition could have been levied upon and sold under judicial process against the bankrupt, and therefore the same would pass to the plaintiff, as trustee, under sections 67*a* and 70*a* of the Bankruptcy Law. The Supreme Court of Vermont decided against this claim of the plaintiff's by holding that by Ryan's attachment being invalidated by bankruptcy proceedings the defendant's rights under his mortgage of April 15, 1891, stood the same as though there had been no attachment made. *(Transcript of Record, p. 47.)* That decision was against a right and title claimed by the plaintiff under a United States Statute, and this court therefore has jurisdiction to review the same.

As shown by the above claims made by the plaintiff in the State Court, the plaintiff based his title to the fund held by the defendant, solely upon the provisions of the United States Bankruptcy Law of 1898, and the decision of the State Court was against such claim. It has been held by the Supreme Court of the United States that where a trustee in bankruptcy claims certain property as belonging to him under the Bankruptcy Act, and the State Court decides against his title, a Federal question is involved which gives the Supreme Court of the United States jurisdiction to review the decision of the State Court.

Williams vs. Heard, 140 U. S. 529.
Dushane vs. Beall, 161 U. S. 513.

The Federal question was also properly asserted in the state court. Although there is no allegation in the pleadings of the claim of a Federal right further than the allegation in the plaintiff's declaration that he brought this suit as trustee in bankruptcy, yet the Federal questions in the case were presented to the state cou t, and that tribunal took notice of them and passed upon them. Upon this point the Supreme Court of Vermont said.

> "The question then arises whether the defendant by virtue of this mortgage and the taking posession of the property thereunder had a lien on the property taken and sold paramount to the rights of the plaintiff as trustee under the bankrupt law. The plaintiff contends that the defendant did not have a lien valid against creditors under that act, and he seeks to recover the amount received by the defendant from the sale of the property." *(Transcript of Record, p. 48.)*

All that is essential is that the Federal questions must be presented in the State Court in such a manner as to bring them to the attention of that tribunal.

Missouri K. & T. R. Co. vs. Elliott, 184 U. S. 530.

Chicago, B. & Q. R. Co. vs. Chicago, 166 U. S. 266.

F. G. Oxley Stave Co. vs. Butler County, 166 U. S. 648.

And if it appears from the record that the Federal right

so set up and claimed was either expressly denied, or that such was the necessary effect in law of the judgment of the state court, this Court has jurisdiction.

Roby vs. Colehour, 146 U. S. 153.

Chapman vs. Goodnow, 123 U. S. 540.

San Francisco City & County v. Itsell, 133 U. S. 65.

Green Bay & M. Canal Co. vs. Patten Paper Co. 172 U. S. 58.

EDWARD H. DEAVITT,
Attorney for Plaintiff.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904

No. 117

FRANK D. THOMPSON
TRUSTEE IN BANKRUPTCY OF
HERBERT E. MOORE, BANKRUPT
PLAINTIFF IN ERROR

vs.

HENRY FAIRBANKS

IN ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT

Plaintiff's Brief.

EDWARD H. DEAVITT,
Attorney for Plaintiff

Statement of Case.

This is an action of general assumpsit brought by Frank D. Thompson, Trustee in Bankruptcy of Herbert E. Moore, Bankrupt, Plaintiff in Error, against Henry Fairbanks, Defendant in Error, in the Caledonia County Court for the State of Vermont, to recover as assets of said Bankrupt's Estate the sum of $922.08, and interest, the same being the net avails received by the defendant from the sale of said bankrupt's livery property by Lorenzo Sulloway, a sheriff.

The defendant pleaded the general issue, with notice in accordance with the statute.

The matter was referred to a Referee for a hearing on the facts, his report on the facts was filed at the December Term, 1902, of said Caledonia County Court, and a *pro forma* judgment on the same was rendered for the defendant.

The case was heard at the May Term, 1903, of the Supreme Court of Vermont on exceptions by the plaintiff, and at the same term the judgment of the lower court was affirmed.

The case is before this Court on a writ of error to the Supreme Court of Vermont.

The facts are as follows:

The bankrupt during the time of the transactions hereinafter mentioned conducted a livery business in St. Johnsbury in said County of Caledonia, in buildings owned by the defendant. The defendant at various times assisted the bankrupt in raising money to conduct said livery business.

April 15, 1891, said bankrupt executed and delivered to the defendant a chattel mortgage on all his livery property, the description of the property in said mortgage

being as follows: "All my livery property consisting of horses, wagons, sleighs, vehicles, harnesses, robes, blankets, etc., also all horses and other livery property that I may purchase in my business or acquire by exchange."

The condition in said mortgage was as follows: "Upon condition that if I well and truly pay or cause to be paid to the said Henry Fairbanks all that I now owe him or may owe him hereafter by note, book account, or in any other manner, and shall well and truly save the said Henry Fairbanks harmless and indemnified from paying any commercial paper on which he has become or may hereafter become holden in any manner for my benefit as surety, endorser or otherwise, then this deed shall be void, otherwise of force."

The affidavit in the mortgage was as follows:

"We severally swear that the foregoing mortgage is made for the purpose of securing the debt and other liability specified in the conditions thereof and the contemplated loan and liability and for no other purpose whatever, and that the same is a just debt honestly due and owing from the mortgagor to the mortgagee, and the other liability is honest and the contemplated liability is for the honest purpose of enabling the grantor to raise money for use in his livery business."

The bankrupt continued in said livery business and made sales, purchases and exchanges of said livery stock so that on March 5, 1900, and at all times thereafter, there remained of the livery property on hand April 15, 1891, only two horses called "Tom" and "Mattie" respectively. The bankrupt remained in the absolute possession of said livery property until May 7, 1900, and the defendant never took possession of any of said livery property until the taking of May 16, 1900, hereinafter mentioned.

On March 5, 1900, the bankrupt executed and delivered to the defendant a second chattel mortgage of said livery property to secure the same debts secured by the mortgage of April 15, 1891, and on March 23, 1900, the defendant assigned all his "right, title, interest and estate in and unto the property conveyed by" this mortgage to the Passumpsic Savings Bank, who held said mortgage at all times thereafter.

Shortly prior to March 5, 1900, the bankrupt became, and continued, wholly insolvent.

May 7, 1900, one John Ryan sued out a writ against the bankrupt and placed an attachment upon this livery stock to the amount of five hundred dollars. One Wilbur Worthen, a deputy sheriff, made this attachment by lodging a copy of the writ in the town clerk's office as provided by statute.

On May 16, 1900, one Lorenzo Sulloway, a sheriff, by direction of the defendant, and with the consent of the bankrupt, took possession of all this livery property by virtue of the chattel mortgage of April 15, 1891, for the purpose of selling the same. At that time the bankrupt was contemplating going into bankruptcy. The defendant knew this, knew that the bankrupt was insolvent, and knew of the Ryan attachment of May 7, 1900, and understood, at that time, that it was probable that that attachment would hold good as against his mortgage. He had the officer take possession of the property with the purpose on his part to thereby perfect his lien on said property and make it available for the payment of his debt before other complications by way of attachment or bankruptcy arose. The bankrupt consented that the property should be so taken and sold under the mortgage, but he did not consent that the avails of the sale should be applied on the defendant's debt.

The arrangement for taking and selling the property was made between one Dunnett, attorney for the bankrupt, and one Stafford, attorney for the defendant. By this arrangement the officer was to sell the property under the mortgage and hold the avails of the sale in place of the property for whoever turned out to be entitled thereto. Mr. Stafford asked one Howe, attorney for Ryan, to consent to this arrangement but he refused.

On June 11, 1900, the sheriff sold the livery property under the mortgage, and at some time thereafter paid the proceeds of the sale, $922.08, to the defendant, but the date on which this money was paid to the defendant does not appear. The officer's return of said sale was made July 10, 1900, about a week after the bankrupt was adjudicated a bankrupt. At the time the officer took possession of the property, the bankrupt was owing the defendant $169.19, all of which accrued after the execution of the mortgage, while the defendant was holden as endorser upon the bankrupt's note for $525, at the First National Bank of St. Johnsbury, and upon his note for $2510.75 at the Passumpsic Savings Bank of St. Johnsbury. At the time the officer took possession of the livery property the note at the First National Bank was not due, but it became due before the sale, and was paid by the defendant. The note at the Passumpsic Savings Bank was not paid.

June 30, 1900, the bankrupt filed his voluntary petition in bankruptcy, was adjudged a bankrupt July 3, 1900, and on September 15, 1900, the plaintiff was appointed his Trustee in Bankruptcy. There have been proved against the estate claims to the amount of between $5000 and $6000. On September 15, 1900, the Passumpsic Savings Bank proved its note of $2510.75 against the estate.

For the purpose of defeating the effect of the defendant's taking possession of the livery property under his chattel mortgage as aforesaid, the plaintiff, before the commencement of this suit, brought his petition to the United States District Court for the District of Vermont to have the lien of Ryan's attachment preserved for the benefit of the bankrupt's estate, under section 67*f* of the Bankruptcy Act of 1898. The petition was dismissed by the Court, for the reason that the Court had doubts as to whether or not the mortgage was valid under the provisions of the Bankruptcy Act of 1898, and thought that "the trustee might be embarassed about enforcing the provisions of the Act, making the mortgage lien of the foreclosure proceedings void in his own name, and enforcing Ryan's lien by attachment, if it should be preserved here, in the sheriff's name, on the same property at the same time." *(Transcript of Record, pp. 40-43.)*

The defendant, in his notice filed with his plea, justified the seizure and sale of the property in question by virtue of the mortgage of April 15, 1891, and claimed it was a valid mortgage duly executed in accordance with the provisions of the Vermont Statutes governing chattel mortgages.

The sections of the Vermont Statutes governing the mortgaging of personal property read as follows:

"Sec. 2251. All personal property shall be subject to mortgage agreeably to the provisions of this chapter.

"Sec. 2252. A mortgage of personal property shall not be valid against any person except the mortgagor, his executors and administrators, unless the possession of the property is delivered to, and retained by the mortgagee, or the mortgage is recorded in the office of the clerk of the town in which the mortgagor resides at the time of making the same, or if he resides out of the state, in the town in which the property is situated.

"Sec. 2253. Each mortgagor and mortgagee or, in the absence of the mortgagee, his agent or attorney, shall make and subscribe an affidavit in substance as follows:

'We severally swear that the foregoing mortgage is made for the purpose of securing the debt *specified* in the conditions thereof, and for no other purpose, and that the same is a just debt, due, and owing from the mortgagor to the mortgagee.' Which affidavit with the certificate of the oath signed by the authority administering the same, shall be appended to such mortage, and recorded therewith.

"Sec. 2255. If such mortgage is given to indemnify the mortgagee against liability assumed, or to secure the fulfillment of an agreement other than the payment of a debt due from the mortgagor to the mortgagee, such liability or agreement shall be stated *specifically* in the condition of the mortgage, and the affidavit shall be so varied as to verify the validity and justice of such liability or agreement."

One of the plaintiff's claims before the State Court was that said mortgage was not executed in accordance with said provisions of the Statute, for that, (1) no debt was specifically described in the condition thereof, (2) that the debt the bankrupt owed the defendant on open account accrued after the execution of the mortgage, and that future advances, debts, and liabilities could not be secured by a statutory chattel mortgage, and (3) that the liability assumed by the defendant for the bankrupt was not specifically described in the condition of the mortgage and that therefore the mortgage was void, and the mortgaged property would pass to the trustee in bankruptcy, and cited in support of his claim, *Nichols vs. Bingham, 70 Vt. 320, Page vs. Ordway, 40 N. H. 253,*

Tarbell vs. Jones, 56 Vt. 312, Sherman vs. Estey Organ Co., 69 Vt. 355.

The Supreme Court of Vermont, however, avoided deciding this question, but treated the mortgage of April 15, 1891 as a common law chattel mortgage, *(Transcript of Record, pp. 50-55,)* and it will be so treated in this brief.

Ryan's attachment of May 7, 1900, was made in conformity with section 1103 of Vermont Statutes which reads as follows:

"When personal property is taken upon a writ of attachment or execution, the officer serving such process may lodge a copy of the same, with his return, in the clerk's office in the town where the property is taken, or if taken in an unorganized town or gore, the copy shall be lodged in the clerk's office of the county where such property is taken, which lodgment shall hold the property against all subsequent sales, attachments or executions, as if it had been actually removed and taken into possession of the officer."

And after an attachment in accordance with this statute, the officer is considered as having the legal custody of the attached property, and sufficient title and possession so as to maintain an action therefor against any one who removes or converts the same.

Lowry vs. Walker, 4 Vt. 76.
Putnam vs. Clark, 17 Vt. 82.
Thorp vs. Robbins, 68 Vt 53.
Barron vs. Smith, 63 Vt. 121.
Smith vs. Church, 27 Vt. 168.
Bucklin vs. Crampton, 20 Vt. 261.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

No. 517

FRANK D. THOMPSON
TRUSTEE IN BANKRUPTCY OF
HERBERT E. MOORE, BANKRUPT
PLAINTIFF IN ERROR

vs.

HENRY FAIRBANKS

IN ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT

MOTION TO DISMISS OR AFFIRM.

C. A. PROUTY,
Attorney for the defendant.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904

No. 117

FRANK D. THOMPSON
TRUSTEE IN BANKRUPTCY OF
HERBERT E. MOORE, BANKRUPT
PLAINTIFF IN ERROR

vs.

HENRY FAIRBANKS

IN ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT

MOTION TO DISMISS OR AFFIRM.

Now comes Henry Fairbanks, defendant, and moves to dismiss the writ of error herein, or affirm the judgement, for the following reasons:

1. That this court has no jurisdiction.
2. That no federal question is involved.

C. A. PROUTY,
Attorney for the defendant.

BRIEF IN SUPPORT OF MOTION TO DISMISS.

STATEMENT OF CASE.

April 15, 1891, Fairbanks, the defendant in error, took a chattel mortgage from Moore, the bankrupt, of his livery stock located in St. Johnsbury, Vermont. The mortgage provided that Moore might sell and exchange the property; that he should by sale, exchange and renewal keep the property good, and that the mortgage should attach to after-acquired property. Moore continued in possession of the property under this mortgage until may 16, 1900, when Fairbanks took possession. At that time practically all the property was after-acquired. Moore was insolvent, as both he and Fairbanks knew. He consented that Fairbanks might take possession of the property, not with any intent to prefer him to other creditors, but because he understood that such was his legal right under the mortgage. June 11, 1900, Fairbanks sold the property. June 30, 1900, Moore filed a voluntary petition in bankruptcy, and Thompson was appointed his trustee. Thompson brought suit in the proper Vermont court to recover the value of the property so taken and sold, claiming that Fairbanks' lien under his mortgage and subsequent proceedings was valid as against bankruptcy creditors. The Supreme Court of Vermont gave judgment against Thompson, who thereupon sued out this writ of error, assigning as error that the Vermont court failed to properly apply certain provisions of the Bankruptcy Act of 1898. The defendant in error now files his motion to dismiss upon the ground that this court has no jurisdiction.

ARGUMENT.

Under the Bankruptcy Act of 1898 the trustee could only bring suit for the recovery of this property in the State court. Bardes *v.* Hawarden Bank, 178 U. S. 524, Wall *v.* Cox, 181 U. S. 244.

In the suit which he did so begin the highest court of the State has given final judgment against him. The Bankruptcy Act itself provides no method for reviewing that judgment in this court. It can only be reviewed, therefore, for the same reasons and upon the same grounds as though given upon some matter not connected with bankruptcy; in other words, a federal question must have been presented, must have been decided adversely to the plaintiff in error, and the judgment of the State court must necessarily have rested upon that decision.

The Vermont court held that the Fairbanks mortgage of 1891 was a valid common law mortgage as to the after-acquired property; that while such a mortgage might not be valid as against a sale, or a mortgage in due form, or an attachment, or perhaps an adjudication in bankruptcy so long as the mortgagee remained in possession, it gave the mortgagor, after condition broken, the right of possession, and that by taking such possession his title under the mortgage was perfected and *related back to the date of the mortgage itself.* The following is the language of the Supreme Court of Vermont upon this point:

> "The referee found that at the time this mortgage was given, it was agreed and understood by the parties thereto that the mortgagor should sell or exchange any of the livery stock covered by the mortgage as he desired, and should thereby and by purchase or otherwise keep the stock good so that the defendant's security should not be impaired; and that all after-acquired livery property should be covered by the

mortgage as security for the debts specified therein; that pursuant to such understanding and agreement, the mortgagor made sales, purchases, and exchanges of livery stock to such an extent that on May 16, 1900, when the defendant took possession of the property under his mortgage, there only remained two certain horses of the property on hand at the time the mortgage was given; that these sales, exchanges and purchases were made by the mortgagor, sometimes without communication with, or advice from the defendant, and frequently after consultation with him; that the livery stock as it existed when the defendant took possession of it was all acquired by exchange of the original stock or with the avails of the old stock sold, or the money derived from the business; and that all the property of which the defendant took possession was acquired by Moore with the full understanding and intent that it should be covered by the defendant's mortgage.

* * * * * *

"The property expressly described in the mortgage was the mortgagor's livery property, and the after-acquired property was, by the description, all horses and other livery property that he might purchase in his business or acquire by exchange. In principle there is no difference between a mortgage on such livery property with acquisitions by purchase or exchange to keep the property in quality and value equal to what it was when the mortgage is given, and a mortgage on a stock of goods with acquisitions by purchase to keep the stock from depletion by sales in the common course of business. That the mortgage in question is good at common law between the parties to it, and that when the mortgagee took possession of the property under it with the consent of the mortgagor, it became a good and valid mortgage on the property including that acquired subsequent to the giving of the mortgage, except as against intervening rights of creditors or other third persons, if any, and that such property came under the cover and operation of the mortgage as of

its date, are questions too well settled in this State to need further discussion. Peabody *v.* Landon, 61, Vt. 318; 15 Am. St. Rep. 903; Rice's Assignees *v.* Hulett, 63 Vt. 321; In re Allen's Estate, 65 Vt. 392; McLoud *v.* Wakefield, 70 Vt. 558."

The Vermont court held, therefore, that Fairbanks had title to this property as of April 15, 1891. This holding depended entirely upon the construction of the State law and is not reviewable by this court. If correct, it disposes of the case, for a title acquired in 1891 could not be affected by proceedings in bankruptcy begun in 1900. Whatever the Vermont court said later in its opinion as to the application of certain provisions of the bankruptcy Act was entirely unnecessary to the judgement finally rendered by that court. Hence this court has no jurisdiction, even though the State court did discuss a federal question and did decide that question adversely to the plaintiff in error.

"It is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a State in which a decision in the suit could be had, it must appear affirmatively not only that a federal question was presented for decision by the highest court of the state having jurisdiction. but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on an independent ground, not involving a federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any federal question that may also have been presented." California Powder Works *v.* Davis, 151 U. S. 389, 393; Eustis *v.* Bolles, 150 U. S. 361; Rutland Railroad Company *v.* Central Vermont Railroad Company, 159 U. S. 630; Harrison *v.* Morton, 171 U. S. 38.

The point passed upon by the Vermont court as above concerns the title of Fairbanks to the property, not the effect of bankruptcy proceedings upon that title; but this holding is decisive, for if he had such title as the court declared, there is no possible theory upon which bankruptcy could affect it. Scott *v.* Kelley, 89 U. S. 57.

C. A. PROUTY,

Attorney for Defendant.

And against an officer so attaching property, replevin, trespass and trover will lie.

Angell vs. Keith, 24 Vt. 371.

In the State Court the plaintiff claimed that, under the provisions of the United States Bankruptcy Law of 1898, the defendant by virtue of his mortgage, and the taking possession of the livery property thereunder, did not have a lien on said property good as against the plaintiff as trustee in bankruptcy. The decision of the Supreme Court of Vermont was against the claim of the plaintiff.

The specific claims raised in the court below are fully stated in the assignment of errors which are as follows:

1. The court erred in holding that the bankrupt's livery property did not pass to the plaintiff under section 70*a* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 565, 566; and in failing to hold that the bankrupt's livery property did pass to the plaintiff under section 70*a* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 565, 566.

2. The court erred in holding that the money obtained from the sale of the bankrupt's livery property on June 11, 1900, did not pass to the plaintiff under section 70*a* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 565, 566; and in failing to hold that the money obtained from the sale of the bankrupt's livery property on June 11, 1900, did pass to the plaintiff under section 70*a* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 565, 566.

3. The court erred in holding that the plaintiff could not recover the amount received by the defendant from the sale of the bankrupt's livery property on June 11, 1900, under section 70*c* of the United States Bankruptcy

Law of July 1, 1898, 30 Stat. at L. 566; and in failing to hold that the plaintiff could recover the amount received by the defendant from the sale of the bankrupt's livery property on June 11, 1900, under section 70*e* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 566.

4. The court erred in holding that the defendant's chattel mortgage of April 15, 1891, was a valid lien against the bankrupt's estate under section 67*a* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 564; and in failing to hold that the defendant's chattel mortgage of April 15, 1891, was not a valid lien against the bankrupt's estate under section 67*a* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 564.

5. The court erred in holding that the plaintiff was not subrogated to the rights of the Passumpsic Savings Bank and of John Ryan, creditors of the bankrupt, as against the defendant's chattel mortgage of April 15, 1891, and could not enforce said rights against said mortgage of April 15, 1891, for the benefit of said bankrupt's estate under section 67*b* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 564; and in failing to hold that the plaintiff was subrogated to the rights of the Passumpsic Savings Bank and of John Ryan, creditors of the bankrupt, as against the defend ant's chattel mortgage of April 15, 1891, and could enforce said rights against said mortgage of April 15, 1891, for the benefit of said bankrupt's estate, under section 67*b* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 564.

6. The court erred in holding that upon Moore's being adjudicated a bankrupt under the provisions of the United States Bankruptcy Law of July 1, 1898, 30 Stat.

at L. 544, chap. 541, the defendant's rights under his chattel mortgage of April 15, 1891, stood the same as though the mortgage of March 5, 1900, had not been given to and assigned by him, or the Ryan attachment of May 7, 1900, made.

7. The court erred in holding that the property covered by the Ryan attachment of May 9, 1900, did not pass to the plaintiff under section 67*f* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 565, upon Moore's being adjudicated a bankrupt.

8. The court erred in holding that the Ryan attachment of May 7, 1900, being made within four months prior to the filing of the petition in bankruptcy by Moore, the lien created thereby could be preserved for the benefit of the bankrupt's estate only by an order from the bankruptcy court for such purpose under section 67*f* of the United States Bankruptcy Law of 1898, 30 Stat. at L. 565.

9. The court erred in holding, that, without an order from the bankruptcy court preserving the same, the attachment of Ryan's of May 7, 1900, became absolutely null and void upon Moore's being adjudicated a bankrupt, under section 67*f* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 565.

10. The court erred in holding that, upon Moore's being adjudicated a bankrupt, the property covered by the mortgage of March 5, 1900, did not pass to the plaintiff under section 67*e* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 564.

11. The court erred in holding that, upon Moore's being adjudicated a bankrupt, the mortgage of March 5, 1900, became absolutely null and void under section 67*e* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 564.

12. The court erred in holding that the defendant by virtue of his mortgage of April 15, 1891, and by taking possession of the livery property thereunder, had a lien on the said property so taken and sold paramount to the rights and title of the plaintiff under the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 544, chap. 541.

13. The court erred in holding that the taking possession of the livery property of the bankrupt on May 16, 1900, by the defendant under his mortgage of April 15, 1891, brought said livery under the cover and operation of said mortgage as of its date, for that said holding is in violation of and contrary to the provisions of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 544, chap. 541.

14. The court erred in holding that the taking possession of the bankrupt's livery property on May 16, 1900, by the defendant under his chattel mortgage of April 15, 1891, was not a transfer of property rendered null and void under section 67*e* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 574, upon the bankrupt's being adjudicated a bankrupt.

15. The court erred in holding that unless Moore parted with the possession of the livery property in question with a purpose on his part to hinder, delay or defraud his creditors, or any of them, his assent to the defendant's taking possession of said livery property would not constitute an invalid transfer thereof within the provisions of section 67*e* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 564.

16. The court erred in holding that unless there was a finding that Moore parted with the possession of the livery property in question with the purpose on his part to hinder, delay or defraud his creditors, or any of them,

his assent to the defendant's taking possession of said livery property would not constitute an invalid transfer thereof within the provisions of section 67*e* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 564.

17. The court erred in failing to hold that the taking possession of the bankrupt's livery property on May 16, 1900, by the defendant under his chattel mortgage of April 15, 1891, was a preference within the meaning of section 60*a* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 562.

18. The court erred in holding that the taking possession of the bankrupt's livery property on May 16, 1900, by the defendant under his chattel mortgage of April 15, 1891, was not a preference voidable by the plaintiff under section 60*b* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 562.

Error No. 19 is waived.

Argument.

I.

The first two errors assigned are that the Supreme Court of Vermont erred in holding that the bankrupt's livery property, or the money obtained from the sale of the same, did not pass to the plaintiff under section 70*a* of the Bankruptcy Act of 1898, and in failing to hold that said property, or the money obtained from the sale of the same, did pass to the plaintiff under said section 70*a*.

Section 70*a*, so far as material to this case, reads as follows: "The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the

date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all xx (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

If at the time the bankrupt filed his petition in bankruptcy his livery property was subject to either manner of disposition, above mentioned, it passed to the plaintiff as trustee of the bankrupt's estate.

Page vs. Edmunds, 187 U. S. 596.
In re Shenberger, 102 Fed. Rep. 978.
Chespeake Shoe Co. vs. Seldner, 122 Fed. Rep. 593.

The mortgage under which the defendant claims title was a common law chattel mortgage. (*Transcript of Record, pp. 51, 52, 55.*)

In Vermont the rule as to the sale of personal property is that, unless a change of possession accompanies and follows the sale, the conveyance is fraudulent *per se* and void as to the creditors of the vendor.

Fuller vs. Sears, 5 Vt. 527.
Weeks vs. Wead, 2 Aik. (Vt.) 64.
Harris vs. Langdon, 5 Vt. 231.
Farnsworth vs. Shepard, 6 Vt. 521.
Mills vs. Warner, 19 Vt. 609.
Hildreth vs. Fitts, 53 Vt. 684.

And such sale is void although the attaching creditor had full knowledge of the same.

Perrin vs. Reed, 35 Vt. 2.
Hart vs. Bank, 33 Vt. 252.
Weeks vs. Prescott, 53 Vt. 57.
Rice vs. Courtis, 32 Vt. 460.

The same rule as to the necessity of a change of possession applies to a common law chattel mortgage.

Tobias vs. Francis, 3 Vt. 425.
Woodward vs. Gates, 9 Vt. 358.
Russell vs. Fillmore, 15 Vt. 130.
Houston vs. Howard, 39 Vt. 54.
Wright vs. Vaughn, 45 Vt. 369.
Kitteridge vs. Freeman, 48 Vt. 62.

Prior to May 16, 1900, no possession of the bankrupt's livery property had ever been taken under the defendant's chattel mortgage of April 15, 1891. On May 16, 1900, the bankrupt was insolvent and contemplating bankruptcy, and all his property was under attachment, and all this the defendant and his attorney knew. At that time it was agreed between Mr. Stafford, the defendant's attorney, and Mr. Dunnett, the bankrupt's attorney, that the officer should take the livery property and sell it under the defendant's mortgage of 1891, and *hold the avails in place of the property for whoever turned out to be entitled thereto*, but at no time was it agreed or

understood that the avails of the sale might be applied upon the defendant's debt. *(Transcript of Record, pp. 15, 16.)*

Under that agreement the officer was not acting for and in behalf of the defendant, but was acting as the agent for all parties interested. He took possession of the property not for the purpose of perfecting the defendant's lien upon it, but for the purpose of preserving the property by converting it into cash, so that it could be divided among all the creditors of the bankrupt according to their respective rights. By the defendant's express agreement he acquired no greater rights by the officer taking possession of the property than he had before. No matter what his intentions were at the time the officer took possession of the property, he, himself, did not get possession of any of the property until the officer paid him the proceeds of the sale, which payment was presumably made on July 10, 1900, the day the officer made the return of the sale under the mortgage, about a week after the bankrupt was adjudicated a bankrupt. Therefore, at the time the petition was filed the avails of the sale were in the hands of the officer awaiting whoever was entitled to them, which person was the plaintiff, as at that time those avails could have been levied upon under judicial process against the bankrupt.

In re Allen's Estate, 65 Vt. 392.

The Supreme Court of Vermont, however, in deciding this case ignored the finding of the referee that the understanding was that the officer was to sell the property and hold the avails of the sale in place of the property for whoever turned out to be entitled thereto, and that the bankrupt did not consent that the avails of

the sale might be applied upon the defendant's debt, but treated the case as though the bankrupt gave his full consent and assistance to everything that the defendant did in applying this property to the payment of his debt, *(Transcript of Record, pp. 50, 52, 53)*, and the plaintiff will so treat the case in the remainder of his brief.

Prior to May 16, 1900, the bankrupt's livery property was subject to attachment by his creditors, whether with or without notice of the defendant's chattel mortgage. On May 7, 1900, nine days before the defendant took possession of the property, one John Ryan, a creditor of the bankrupt, sued out a writ against him, declaring therein in general assumpsit for $500 damages, and attached all this livery property. This attachment was, therefore, superior to the title the defendant got by taking possession of the property under his mortgage of 1891, and as the attachment was not dissolved until the bankrupt was adjudicated a bankrupt, at the time the bankrupt filed his petition in bankruptcy, and prior thereto, this property could have been taken and sold under judicial process against him. The plaintiff therefore took title to the property under section 70*a* (5) and can recover the value of the same from the defendant.

Page vs. Edmunds, 187 U. S. 596.
In Re Butterwick, 131 Fed. Rep. 371.
Desany vs. Thorp, 70 Vt. 31, 43.
Collender Co. vs. Marshall, 57 Vt. 232.
Stafford vs. Adair, 57 Vt. 63.

II.

The third error assigned is that the Supreme Court of Vermont erred in holding that the plaintiff could not recover the amount received by the defendant from the sale of the livery property, and in failing to hold that the

plaintiff could recover such amount under section 70*e* of the Bankruptcy Act of 1898.

Section 70*e* of the Bankruptcy Act of 1898 reads as follows:

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it except a bona fide holder for value."

As shown by the cases above cited the mortgage of April 15, 1891, was invalid as against the creditors of the bankrupt until possession was taken by the defendant. So long as Ryan's attachment remained in force Ryan could have avoided any transfer of the property by the bankrupt, and especially the attempt to perfect the defendant's mortgage of 1891, and no sale of the property by the defendant could make it valid as against Ryan.

Thorp vs. Robbins, 68 Vt. 53.

Therefore since Ryan, a creditor of the bankrupt could have avoided the taking possession and sale of the bankrupt's livery property by the defendant, and could have recovered the proceeds of the sale from the defendant, at least to the amount of the attachment, the plaintiff, as the bankrupt's trustee, has the same right under section 70*e* of the Bankruptcy Law.

In Re Howland, 109 Fed. Rep. 869.

Skillen vs. Endelmen, 39 Misc. 261, 79 N. Y. Supp. 413, 11 Am. B. R. 766.

III.

The fourth and fifth errors assigned are that the

Supreme Court of Vermont erred in holding that the defendant's chattel mortgage of April 15, 1891, was a valid lien against the bankrupt's estate under section 67*a* of the Bankruptcy Law, and in failing to hold that the defendant's chattel mortgage of 1891 was not a valid lien against the bankrupt's estate under said section 67*a*; and in holding that the plaintiff was not subrogated to the rights of the Passumpsic Savings Bank and of John Ryan, creditors of the bankrupt, as against the defendant's chattel mortgage of April 15, 1891, and could not enforce said rights against said mortgage of 1891 for the benefit of said bankrupt's estate under section 67*b* of the Bankruptcy Law, and in failing to hold that he was subrogated to the rights of said Bank and of said Ryan as against defendant's said mortgage of 1891, and could enforce said rights against said mortgage for the benefit of said bankrupt's estate under section 67*b* of the Bankruptcy Law.

Section 67*a* of the Bankruptcy Law reads as follows:

"Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

Section 67*b* reads as follows:

"Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate."

Section 1 (29) of the Bankruptcy Act provides that "words importing the plural number may be applied to and mean only a single person or thing."

a. The defendant's mortgage of April 15, 1891, was

not a valid claim as against the claim of Ryan, because of want of possession before Ryan sued out his attachment.

Rice vs. Courtis, 32 Vt. 460.

In that case at page 469 the court said "But in this State we regard the want of change of possession as a fraud in law, so far as the processes of our courts are concerned. To that extent it is the same as if no sale had been made. And we have applied this rule to all personal chattels remaining within the State at the time of transfer and not exempt from attachment, and to all modes of transfer, whether of the absolute title, or the creating of a lien by way of pledge, or mortgage, or by assignment for the benefit of creditors. So that it will be necessary to show such a change of possession in the present case, in order to enable the plaintiff to hold the goods against the defendant's attachment."

So in the case at bar, as Ryan's attachment was valid and binding until the bankrupt was adjudicated a bankrupt, at the time the petition in bankruptcy was filed the defendant's mortgage of April 15, 1891, was not a valid lien as against the claim of Ryan, a creditor of the bankrupt, and it therefore is not a valid lien against the estate of the bankrupt, and the plaintiff can recover the proceeds of the sale of the property from the defendant.

In Re Andrae, 117 Fed. Rep. 561.

In Re Frazier, 117 Fed. Rep. 746.

Torrance vs. Winfield Nat. Bank, 66 Kan. 177, 71 Pac. Rep. 235.

In Re Pekin Plow Co. (C. C. A.) 112 Fed. Rep. 308.

In Re Thorp, 130 Fed. Rep. 371.

b. On March 5, 1900, there remained of the original livery property covered by the defendant's mortgage of April 15, 1891, only two horses, "Tom" and "Mattie,"

which brought at the sale of June 11, 1900, the sums of $42.50 and $26, respectively. *(Transcript of Record pp. 12, 13.)* All of the remaining property, although an attempt was made to cover it by the mortgage of April 15, 1891, was acquired subsequently to that date.

It is an elementary principal of law that one cannot convey by mortgage, or absolutely, personal property, which has no express or potential existence, as his property at the time of the conveyance.

Peabody vs. Landon, 61 Vt. 318, 328.

But a stipulation in a mortgage that future acquired property shall be covered by the mortgage "is an executory agreement of such a character, that the creditor with whom it is made may, under it, take the property into his possession, when it comes into existence, and is the subject of transfer by his debtor, and hold it for his security; and whenever he does so take it into his possession, before any attachment has been made of the same, or any alienation thereof, such creditor, under his executory agreement, may hold the same; *but, until such an act done by him, he has no title to the same;* and that, such act being done, and the possession thus acquired, the executory agreement of the debtor authorizing it, it will then become holden by virtue of a valid lien or pledge."

Moody vs. Wright, 13 Met. 17, 32.

Griffith vs. Douglass, 73 Me. 532; 40 Am. Rep. 395.

Cook vs. Corthell, 11 R. I. 482; 23 Am. Rep. 518.

Looker vs. Peckwell, 38 N. J. Law, 253.

On March 5, 1900, the bankrupt executed and delivered to the defendant another chattel mortgage of all his then livery property, and on March 23, 1900, the defendant made an assignment of this mortgage to the

Passumpsic Savings Bank, a creditor of the bankrupt, as follows; "Know all men by these presents, that I, Henry Fairbanks of St. Johnsbury in the county of Caledonia and State of Vermont, in consideration of one dollar paid to my full satisfaction by the Passumpsic Savings Bank of St. Johnsbury in the county of Caledonia and State of Vermont, *do hereby, assign, transfer and convey unto the said The Passumpsic Savings Bank, successor and assigns forever all my right, title, interest and estate in and unto the property conveyed by the within mortgage* and all my rights and privileges under said mortgage."

We maintain that, as to all the property acquired subsequently to April 15, 1891, this mortgage of March 5, 1900, conveyed a title superior to that of the mortgage of April 15, 1891, as the defendant had never taken possession of the same, and when the defendant assigned said mortgage to the Passumpsic Savings Bank it obtained a title to all of such after acquired property superior to any that the defendant might thereafter acquire under his mortgage of April 15, 1891; furthermore, the defendant by his assignment of March 23, 1900, did not convey to the Bank merely the title to said livery property obtained by his mortgage of March 5, 1900, but he transferred and conveyed to the Bank all his right, title and interest in and unto the property conveyed by the said mortgage, and that would include all the right, title and interest to the property which he had acquired under his mortgage of April 15, 1891, as the property conveyed by the mortgage of March 5, 1900, was the same property sought to be conveyed by the mortgage of April 15, 1891. Thereafter, as between the defendant and the Bank, the Bank was the owner of all the livery property, and after the defendant took possession of and sold said property under his mortgage of April 15, 1891,

as aforesaid, the Bank could have maintained a suit against him to recover the value of said property.

Longey vs. Leach, 57 Vt. 377.

But as the mortgage of March 5, 1900, was executed within four months prior to the bankrupt's filing his petition in bankruptcy, and the Bank was not a purchaser "for a present fair consideration," it was invalidated by the subsequent adjudication in bankruptcy, and the Bank was prevented from enforcing its rights as against the lien attempted to be created by the defendant by his taking possession of the livery property under his mortgage of April 15, 1891.

And as Ryan's attachment was made within the four months preceding the filing of the petition in bankruptcy by the bankrupt, he, also, was prevented from enforcing his rights as against the lien attempted to be created by the defendant by his taking possession of the livery property under his mortgage of April 15, 1891.

Therefore, the plaintiff as trustee of the bankrupt's estate, by the provisions of section 67*b* was subrogated to the rights of said Passumpsic Savings Bank, and said Ryan, and in this action is entitled to recover the proceeds of said sale.

In Re Howland, 109 Fed. Rep. 869.

In Re New York Economical Printing Co., 110 Fed. Rep. 514.

Patten vs. Carley, 69 App. Div. 425, 74 N. Y. Supp. 994.

Skillen vs. Endelmen, 39 Misc. 261, 79 N. Y. Supp. 413.

Gove vs. Morton Trust Co. (N. Y.) 12 Am. B. R. 297.

IV.

The 6th, 7th, 8th, 9th, 10th, and 11th errors assigned are as follows:

6. The court erred in holding that upon Moore's being adjudicated a bankrupt under the provisions of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 544, Chap. 541, the defendant's rights under his chattel mortgage of April 15, 1891, stood the same as though the mortgage of March 5, 1900, had not been given to, and assigned by him, or the Ryan attachment of May 7, 1900, made.

7. The court erred in holding that the property covered by the Ryan attachment of May 7, 1900, did not pass to the plaintiff under section 67*f* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 565, upon Moore's being adjudicated a bankrupt.

8. The court erred in holding that the Ryan attachment of May 7, 1900, being made within four months prior to the filing of the petition in bankruptcy by Moore, the lien created thereby could be preserved for the benefit of the bankrupt's estate only by an order from the Bankruptcy Court for such purpose under section 67*f* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 565.

9. The court erred in holding, that, without an order from the Bankruptcy Court preserving the same, the attachment of Ryan's of May 7, 1900, became absolutely null and void upon Moore's being adjudicated a Bankrupt, under section 67*f* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 565.

10. The court erred in holding that, upon Moore's being adjudicated a bankrupt, the property covered by the mortgage of March 5, 1900, did not pass to the

plaintiff under section 67*e* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 564.

11. The Court erred in holding that, upon Moore's being adjudicated a bankrupt, the mortgage of March 5, 1900, became absolutely null and void under section 67*e* of the United States Bankruptcy Law of July 1, 1898, 30 Stat at L. 564.

Section 67*e* reads as follows:

"That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of this Act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee

and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt."

Section 67*f* reads as follows:

"That all levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect. *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

The Supreme Court of Vermont held that the mortgage of March 5th, 1900, assigned by the defendant to the Passumpsic Savings Bank, became null and void under section 67*e*, and that Ryan's attachment of May 7th, 1900, became null and void under section 67*f*, upon the bankrupt being adjudicated a bankrupt, and that, with the Bank's mortgage and the attachment thus invalidated thedefendant's rights under his mortgage of April 15, 1891, stood the same as though there had been no subsequent mortgage given nor attachment made. The Court further

held that the only way the bankrupt's estate could benefit by Ryan's attachment was by obtaining an order from the Bankruptcy Court preserving such attachment for the benefit of the estate. *(Transcript of Record, pp. 47, 48.)*

This we claim was error.

The attachment of the livery property on Ryan's writ by the officer, by copy lodged in the Town Clerk's office, had the effect to vest the possession of the property in the officer so as to hold the property against all subsequent sales, or interference, as though the property had been actually removed and taken into the officer's actual possession.

Supra., p. 8.
Thorp vs. Robbins, 68 Vt. 53.
Barron vs. Smith, 63 Vt. 121.
West River Bank vs. Gorham, 38 Vt. 649.
Angell vs. Keith, 24 Vt. 371.

As the mortgage of 1891 was a common law chattel mortgage, and as the property in existence in May, 1900, was after acquired property, so long as the Ryan attachment was in force it was impossible for the defendant to perfect his lien by taking possession, as the rights of third parties had intervened, and the possession of the property was already in another person.

Peabody vs. Landon, 61 Vt. 318, 329.
Moody vs. Wright, 13 Met. 17, 33.
Re Allen's Estate, 65 Vt. 392.

The taking possession of the livery property by the defendant, and the sale of the same under his mortgage of April 15, 1891, was, therefore, an unlawful act, a trespass, and the attaching officer could have maintained trespass, trover or replevin against him for the property.

National Bank of Chelsea vs. Miller and Fitts, 67 Vt. 66.

Barron vs. Smith, 63 Vt. 121.

Arnold vs. Maroney, 17 R. I. 579, 23 Atl. 1101.

Drake on Attachment, §291.

Also, if our previous contention is correct, (*supra p. 21*), the assignment of the mortgage of March 5, 1900, by the defendant to the Passumpsic Savings Bank, gave to the Bank a title to all the livery property superior to any that the defendant could thereafter acquire under his mortgage of April 15, 1891.

If there had been no bankruptcy law in force at the time Fairbanks took possession and sold the mortgaged property, such proceedings would have given him no title superior to the Bank's mortgage, or the Ryan attachment, and the defendant so understood the latter fact. (*Transcript of Record, p. 15.*)

The main purpose which the Bankruptcy Law of 1898 seeks to accomplish is the equal distribution of the bankrupt's property *pro rata* among his creditors, and to further that equal distribution, certain liens obtained within four months of the filing of the petition in bankruptcy, are declared null and void upon the debtor being adjudicated a bankrupt.

Swarts vs. Fourth National Bank, (C. C. A.), 117 Fed. Rep. 1.

Buchannan vs. Smith, 16 Wall. 277.

And the rights of all claimants to the estate of the bankrupt are fixed by the status of their claims at the time of the filing of the petition in bankruptcy.

Swarts vs. Fourth National Bank, 117 Fed. Rep. 1.

In Re Bingham, (D. C. Vt.) 94 Fed. Rep. 796.

To hold, as the Supreme Court of Vermont did, that Moore's being adjudicated a bankrupt gave vitality to the defendant's taking possession of the livery property,

an act which, when made was a trespass, and was ineffectual for any purpose of priority over the Bank's mortgage or Ryan's attachment, and to then employ that act, thus vitalized, to defeat the primary object of the adjudication, which was the distribution of the bankrupt's effects for the equal benefit of all his creditors, is placing a construction upon the bankruptcy act which is demanded neither by its letter or spirit.

The filing of the petition in bankruptcy by the bankrupt did not dissolve the Bank's mortgage nor Ryan's attachment, but the adjudication of bankruptcy did, so, until the adjudication was made, the Bank's mortgage and Ryan's attachment were liens superior to the defendant's mortgage of April 15, 1891. The adjudication in bankruptcy could not have the retroactive effect to give the defendant a preference as of the date of his taking possession of the livery property, or of the date when the mortgage was executed, April 15, 1891, when at the time the defendant took possession of the livery property he acquired no priority of right over the Bank's mortgage or Ryan's attachment. The adjudication left the defendant's title just as it stood on the day the petition in bankruptcy was filed, but by virtue of sections 67*e* and 67*f*, it divested all the title and right of the bankrupt, and of the Bank under its mortgage, and also the qualified title and right vested in the deputy sheriff by virtue of the attachment under Ryan's writ, and vested them in the trustee, whose title related back to the time of the assignment of the mortgage to the Bank, and to the time of the attachment. To hold otherwise would be to defeat the whole policy and purpose of the Bankruptcy Act of 1898.

Reed vs. McIntyre, 98 U. S. 507.

In Re Badenheim, 15 N. B. R. 370, Fed. Cas. No. 716.

In Re Biesenthal, 14 Blatch. 146, Fed. Cas. No. 1236.

In Re Steele, 7 Biss., 504 Fed. Cas. No. 13,345.

In Re Andrae Co., 117 Fed. Rep. 561.

Beamer vs. Truman, 84 Cal. 554, 24 Pac. 169.

In *Beamer vs. Truman* a mortgage was executed November 4th, 1882, but was not recorded until August 13, 1886. August 11, 1886, two days before the mortgage was recorded, Baker & Hamilton, creditors of the mortgagor, placed an attachment upon the mortgaged property. August 20, 1886, the mortgagor was adjudged insolvent. The insolvency law of California provided that attachments made within one month prior to insolvency proceeding should be void.

The Court in holding that the attachment was not so absolutely discharged that the mortgagee could hold the property as against the assignee in insolvency, said: "We think it clear, however, that as Baker & Hamilton acquired a lien by attachment upon the engine before the mortgage upon it was recorded, as to them the mortgage is void, * * * * and the attachment levy prevented the title of the mortgagor from passing to the mortgagee.

"Now to hold that the release of the lien thereby made was absolute, and deprived them of all right to pursue the property in the insolvency matter, would give an advantage to the mortgagee, to their detriment, which, he, the mortgagee, failed to acquire in the first place by his laches in not recording his mortgage, and in effect, convert the Insolvent Act, which is designed to protect creditors, into an instrument of wrong against them. It must receive a reasonable construction in order to effectuate its object and promote justice. Applying this rule to it convinces us that the dissolution of the attachment made by it was not absolute so as to let the record of the

mortgage intervene and cut off the right of Baker & Hamilton and leave them, with other creditors, who might have been, up to that time, without recourse against the chattel, but only released the lien and transferred the title to the property to the assignee as part of the assets of the insolvent under section 17 of the above act. And as the title of the mortgagor was prevented from passing to the mortgagee by the attachment of Baker & Hamilton, it remained in the mortgagor until it was by the operation of law transferred to the assignee as the representative of all creditors. Such transfer made him the owner of the chattel, but in trust for the creditors of the insolvent, and, as such owner, he is entitled to recover either it or its value in order to execute his trust."

In *Reed vs. McIntyre*, one Shuey, on the 13th day of March, 1874, made an assignment to one W. S. Combs in trust for the benefit of his creditors. On the succeeding day Mrs. Reed, the appellant, obtained a judgment in one of the State Courts of Minnesota against Shuey, execution immediately issued, and was levied by the sheriff upon the same goods which Combs, as assignee of Shuey, had taken into his possession. Subsequently, on the 31st day of March, 1874, Shuey was petitioned into bankruptcy and was duly adjudicated a bankrupt, and McIntire, the appellee, was duly selected as his assignee in bankruptcy. The question was, whether, upon the assignment for the benefit of Shuey's creditors being set aside in favor of the assignee in bankruptcy, the appelant could hold the bankrupt's property under her judgment and execution as against the assignee in bankruptcy.

This Court in holding that she could not, said: "Since by the sheriff's levy appellant acquired no priority of right in, or lien upon, the goods how could the subsequent proceedings in bankruptcy have the retroactive effect to

give her a preference as of the date of the levy, when as between her and the creditors of Shuey she obtained no priority by virtue of that levy. * * * Appellant cannot use the adjudication in bankruptcy to give vitality to an execution levy, which, when made, was ineffectual for any purpose of priority, and then employ the levy, thus vitalized, to defeat the primary object of the adjudication, which was to distribute the bankrupt's effects for the equal benefit of all the creditors. * * * The adjudication in the Bankruptcy Court was for the purpose of bringing the bankrupt's effects into that court for distribution, and appellant cannot, by force of that adjudication secure a priority, which, without such adjudication, she would not have had. To hold otherwise would be to make the bankruptcy proceedings the instrument of defeating the wise and beneficent policy which the Bankruptcy Act was intended to subserve."

These cases, we think, establish conclusively that the Supreme Court of Vermont erred in their holding.

V.

The 13th, 17th, and 18th errors assigned are as follows:

13. The court erred in holding that the taking possession of the livery property of the Bankrupt on May 16, 1900, by the defendant under his mortgage of April 15, 1891, brought said livery property under the cover and operation of said mortgage as of its date, for that said holding is in violation of and contrary to the provisions of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 544, Chap. 541.

17. The court erred in failing to hold that the taking possession of the Bankrupt's livery property on May 16, 1900, by the defendant under his chattel mortgage of

April 15, 1891, was a preference within the meaning of section 60*a* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 562.

18. The court erred in holding that the taking possession of the bankrupt's livery property on May 16, 1900, by the defendant under his chattel mortgage of April 15, 1891, was not a preference voidable by the plaintiff under section 60*b* of the United States Bankruptcy Law of July 1, 1898, 30 Stat. at L. 562.

The Supreme Court of Vermont refused to hold that the taking possession of the bankrupt's livery property on May 16, 1900, by the defendant under his chattel mortgage of April 15, 1891, was a preference within the meaning of section 60*a* of the Bankruptcy Law of 1898, *(Transcript of Record, pp. 50, 51)*, but did hold that the taking possession of the bankrupt's livery property on May 16, 1900, under and by virtue of the defendant's chattel mortgage of April 15, 1891, brought said livery property under the cover and operation of said mortgage as of its date, *(Transcript of Record, pp. 49, 50)*, which was in effect holding that such taking possession was not a preference within the meaning of section 60*a*, and further held that the defendant's taking possession of the livery property as he did, did not constitute a preference voidable by the plaintiff, as trustee, under section 60*b* of the Bankruptcy Law.

This we claim was error.

Section 60*a* of the Bankruptcy Law reads as follows:

"A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater per-

centage of his debt than any other of such creditors of the same class."

Section 60*b* reads as follows:

"If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

To render a transaction voidable under these two sections four essentials are necessary: first, the insolvency of the debtor; second, the obtaining by one creditor of a greater percentage of his debt than any other creditor of the same class; third, the giving of a preference within four months prior to the filing of the petition, and before the adjudication; and fourth, reasonable cause, on the part of the creditor, to believe that a preference was intended.

The referee found that at the time the defendant took possession of the bankrupt's livery property the bankrupt was insolvent, *(Transcript of Record, p. 13)*, and the evident effect of such possession will be to give to the defendant, a creditor, "a greater percentage of his debt than any other creditor of the same class."

Matthews vs. Hardt, (N. Y.) 79 App. Div. 570.

The next question is when was the transfer of the bankrupt's livery property made. Was it made on April 15, 1891, the date of the execution of the mortgage, and therefore more than four months before the bankrupt filed his petition in bankruptcy, or was it made when the defendant took possession of the livery property, and therefore within four months of the filing of the petition.

The general rule in Vermont in cases of chattel mortgages where possession by the mortgagee is necessary to perfect his title as against third persons is, that, although such possession is not taken until long after the execution of the mortgage, yet the taking actual possession of the mortgaged property brings it under the cover and operation of the mortgage as of its date, the time when the right of possession was first acquired, and, applying such rule to cases arising under the State Insolvency Law, the Supreme Court of Vermont has held that, when a chattel mortgage requiring possession of the mortgaged property to perfect it as to third persons, was executed more than four months before the commencement of insolvency proceedings, that the taking actual possession of the mortgaged property within the four months period brought the property under the mortgage as of its date, and so did not constitute a preference voidable by the trustee, although the other elements constituting a preference were present.

Peabody vs. Landon, 61 Vt. 318.
Rice's Assignees vs. Hulett, 63 Vt. 321.
In Re Allen's Estate, 65 Vt. 392.
McLoud vs. Wakefield, 70 Vt. 558.

The provisions of the State Insolvency Law in regard to void and voidable preferences and transfers were identical to similar provisions of the National Bankruptcy Law of 1867.

Gilbert vs. Vail, 60 Vt. 261.

Under the National Bankruptcy Law of 1867 it was held that the assignee in bankruptcy stood in the shoes of the bankrupt, that "except in cases of attachment against the property of the bankrupt within a prescribed time preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of prop-

erty by the bankrupt is declared to be fraudulent and void, the assignee takes the title subject to all equities, liens, or incumbrances, whether created by operation of law or by act of the bankrupt, which existed against the property in the hands of the bankrupt," and, under that Act, it was held that transfers of property invalid as to creditors because of want of possession or recording, but valid as between the parties, were also valid as against the assignee in bankruptcy.

Stewart vs. Platt, 101 U. S. 731.

Gibson vs. Warden, 14 Wall. 244.

And in deciding the case at bar the Supreme Court of Vermont, in construing sections 60*a* and 60*b*, followed the rule established under the United States Bankruptcy Law of 1867, and the State Insolvency Law, which we think was error.

Under the law of 1898 the trustee in bankruptcy stands more in the shoes of the creditors of the bankrupt, and any transfer of property, though perfectly good as between the parties thereto, if not good as against the creditors of the transferer for want of recording or change of possession, is not good as against the trustee in bankruptcy of the transferer.

Bankruptcy Act of 1898, Sections 70*a*, and 67*a*.

So in the case at bar if the defendant had failed to take possession of the livery property until after the bankrupt had filed his petition in Bankruptcy, the plaintiff, as trustee, would have taken all the property in dispute.

In Re Allen's Estate, 65 Vt. 392.

Page vs. Edmunds, 187 U. S. 596.

In Re Pekin Plow Co. (C. C. A.) 112 Fed. Rep. 308.

Haskell vs. Merrill, 179 Mass. 120.

Under the law of 1898 the intent of the parties to a transfer cuts no figure, it is the result obtained by the transferee as against the creditors of the transferer that is controlling.

Wilson Bros. vs. Nelson, 183 U. S. 191.

In Re Wright Lumber Co., 114 Fed. Rep. 1011.

Section 3*a* of the Bankruptcy Act, in defining acts of bankruptcy, declares that a transfer by a person, while insolvent, of "any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors" is an act of bankruptcy.

Section 3*b* provides that "a petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or if it is not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property, unless the petitioning creditors have received actual notice of such transfer."

As the defendant's chattel mortgage was a common law chattel mortgage, and as the property sought to be covered by it was after acquired property, possession of the property by the defendant was necessary to perfect his title to said property under his mortgage, and as he did not take possession of said property until May 16, 1900, and as on that day the bankrupt was insolvent, and delivered the possession of the property to the defend-

ant with the intent to prefer him over his other creditors, as such was the necessary consequence of his act, *Toof vs. Martin, 13 Wall. 40, Wager vs. Hall, 16 Wall. 584,* the bankrupt on that day committed an act of bankruptcy for which a petition in bankruptcy might have been filed against him at any time within four months thereafter.

If the decision of the Supreme Court of Vermont is correct, we have the anomoly, that in computing the four months within which a petition in bankruptcy may be filed against an insolvent, and the four months within which a preference may be avoided by his trustee, two different methods of computing time are adopted. If the ruling of the Supreme Court of Vermont is followed the result will be that a person can be lawfully adjudged a bankrupt, because he has made a preferential transfer of his property, and a petition in bankruptcy has been filed against him within four months thereafter, but that his trustee cannot recover this property or its value from the transferee thereof, because as to him the transfer occurred more than four months before the petition in bankruptcy was filed. In the case at bar, if such a rule is followed, it results that, as an act of bankruptcy, the bankrupt's mortgage to the defendant was made on May 16, 1900, the day the defendant took possession of the property, but as a preference voidable by the trustee it was made on April 15, 1891. Such a holding is clearly erroneous as it destroys one of the great objects of the bankruptcy law, viz., the equal distribution of the debtor's property among his creditors.

Buckingham vs. McLean, 13 How. 151.
Whitley Grocery Co. vs. Roach, 115 Ga. 918, 42 S. E. 282.

In *Buckingham vs. McLean, supra,* at page 166, this Court said: "It cannot be supposed that what was in

itself an act of bankruptcy and done for the purpose of giving a preference over the general creditors, was intended to be left valid, and effectual to defeat one of the two great objects of the law, which were to grant a discharge to honest debtors who should conform to its provisions, and to distribute their property ratably among all their creditors."

In *Pirie vs. Chicago Title & Trust Co., 182 U. S. 438*, this Court in construing section 60*a*, at page 144, said: "Transfer is defined to be not only the sale of property but 'every other and different mode of disposing of or parting with property.' All technicality and narrowness of meaning is precluded. The word is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, and by which the result forbidden by the statute may be accomplished, a preference enabling a creditor 'to obtain a greater percentage of his debt than any other creditor of the same class,'" and on page 449 the Court, in speaking of the Bankruptcy Act of 1898, further said: "Undoubtedly all the sections of the act must be construed together as means to effect its purpose."

Following that rule, bearing in mind that one of the great objects of the Bankruptcy Law is the equal distribution of the bankrupt's unexempt property among his creditors, if we construe section 3*b* in connection with section 60*b*, and if we take into consideration the facts, that the essential element in a preferential transfer is the result obtained by the creditor from such transfer, and that in regard to all transfers of the bankrupt's property the trustee stands in the shoes of the bankrupt's general creditors, and that in the case at bar the only means and manner by which the ownership and possession of the

bankrupt's livery property as against his creditors could pass from him to the defendant, was by the defendant taking the actual possession of the property, the conclusion must be, that, notwithstanding the previous decisions of the Supreme Court of Vermont, under the provisions of the Bankruptcy Act of 1898, the four months within which a voidable preference can be given, begin to run from the date of the recording or registering of the transfer, or from the date when the beneficiary takes notorious, exclusive or continuous possession of the transferred property.

Wilson Bros. vs. Nelson, 183 U. S. 191.
In Re Sheridan, 98 Fed. Rep. 406.
In Re Klingaman, 101 Fed. Rep. 691.
In Re Ronk, 111 Fed. Rep. 154.
Babbitt vs. Kelley, 96 Mo. App. 529, 70 S. W. 384.
Landis vs. McDonald, 88 Mo. App. 335.
Matthews vs. Hardt, (N. Y.) 79 App. Div. 570.
In Re Ball, 123 Fed. Rep. 164.
In Re Mandel, 127 Fed. Rep. 863.
Anniston Iron & Supply Co. vs. Rolling Mill Co. 125 Fed. Rep. 974.
Tatman vs. Humphrey, 184 Mass. 361.

In *Wilson Bros. vs. Nelson, supra*, the defendant Nelson on Feb. 5, 1885, executed and delivered to one Sarah Johnstone his promissory note for $8960, to which was attached an irrevocable power of attorney authorizing any attorney of any court of record in his name, to confess judgment thereon after maturity of the note. November 21, 1898, Sarah Johnstone caused judgment to be duly entered upon the note and warrant of attorney for the amount of the note and costs. The court, in holding that the failure of the defendant to avoid the

judgment within five days of a sale of the property upon execution issued on the judgment, was an act of bankruptcy, said:

"In the case at bar, the warrant of attorney to confess judgment was indeed given by the debtor nearly thirteen years before. But being irrevocable and continuing in force, the debtor thereby, without any further act of his, 'suffered or permitted' a judgment to be entered against him, within four months before the filing of the petition in bankruptcy, the effect of the enforcement of which judgment would be to enable the creditor to whom it was given to obtain a greater percentage of his debt than other creditors; and the lien obtained by which, in a proceeding begun within the four months, would be dissolved by the adjudication in bankruptcy, because 'its existence and enforcement will work a preference.'"

In the case of *Re Klingaman, supra*, decided in the District Court of Iowa, the facts were as follows: June 17, 1898, Luthy & Co. sold to Klingaman, who was not bankrupt at that time, an order of twine, taking a statement stipulating that the goods were "pledged and hypothecated" to them as security for the payment of the purchase price. This under the Iowa statute constituted an equitable lien upon the goods which could be enforced at any time, but it was not recorded. August 1, 1898, Luthy & Co., having learned that Klingaman was insolvent, took back the unsold twine and credited Klingaman with $100, on the notes given for the purchase price. Klingaman was adjudged a bankrupt August 12, 1898. Luthy & Co. filed their claim against his estate for the balance due on the notes. The question was if they had received a preference. If the transfer dated from June 17 1898, the date of the giving of the lien, it was not a preference, as Klingaman was not insolvent at that time,

but if it dated from August 1, 1898, the day Luthy & Co. took possession of the twine, it was a preference. The court in holding that the transfer was made on August 1, 1898, said "Under the prior Act of 1867, the preference was held to have been given when a lien, valid between the parties thereto, was created, although no notice was given to the other creditors. Under the present act a preference is not created until notice thereof is given to the other creditors, either by recording or registering the instrument of transfer, or by taking actual or open possession of the property by the creditors. It does not seem possible that Congress did not intend this change in the rule to apply to questions arising between a creditor claiming the benefit of a preference and the other creditors. * * * In my judgment, it was the purpose of this enactment to declare generally that, with respect to acts of bankruptcy consisting of making transfers of property when insolvent with intent to give a preference, the act is to be held to have been committed when the transfer is made effectual as against other creditors by recording or registering the instrument of transfer, or by the beneficiary taking actual and open possession of the property, or by otherwise giving actual notice of the transfer to creditors. In other words, the intent of this section, is to declare that, as against creditors of an insolvent, the limitation of time for invoking relief against a preference does not begin to run until in some form they have received actual or constructive notice of the transfer to the preferred creditor; and this intent is reached by the declaration that in such cases the transfer constituting the act of bankruptcy "shall be held to date from the time the instrument of transfer is recorded, or the possession is taken, or notice is otherwise brought home to the creditors of the bankrupt."

In New York, under the State Insolvency Law, the courts held that a mortgage executed within the prohibited time while the debtor was insolvent, in pursuance of a previous agreement was to be treated as of the date of the agreement, that "the date of the agreement pursuant to which any transfer is made and not the date when the conveyance is in fact executed, is to be regarded." In the case of *Matthews vs. Hardt, supra*, the court held that the decisions under the State Law were not applicable to the Act of 1898. In that case an agreement was made between the bankrupt corporation and the defendants more than four months before the commencement of bankruptcy proceedings, by which the defendants were to make advances to enable the bankrupt to go on in its business, and if at any time in the future when the firm had advanced an amount stipulated, the bankrupt failed to pay back such advances, the defendants were to have a lien for the same upon the property of the bankrupt.

The defendant advanced the money as agreed, but the bankrupt failed to keep its part of the agreement. Within four months prior to the filing of a petition in bankruptcy against the bankrupt corporation, and while it was insolvent, the defendants took possession of the bankrupt's property under its agreement and sold the same. The court held that this constituted a preference within the meaning of section 60*b* and was voidable as to the trnstee.

The court, after reviewing the cases under the State Law, said "The trend of the decisions in the United States Supreme Court under the recent Bankruptcy Act upon the subject of the transfer, is in support of the view that, with respect to an instrument of transfer, it is the time when such instrument is recorded, or when possession is taken or notice is otherwise brought home to the creditors of the bankrupt that is controlling."

In *Tatman vs. Humphrey, supra*, an unrecorded chattel mortgage was given by the bankrupt to the defendant more than two years before the commencement of bankruptcy proceedings. The defendant did not take possession of the mortgaged property under his mortgage until about three weeks before the commencement of bankruptcy proceedings, the mortgagor at that time being insolvent, and the defendant having reasonable cause to believe him insolvent. The Supreme Court of Massachusetts held that although the defendant's acquisition of possession of the mortgaged property before the commencement of the proceedings in bankruptcy, and before third person had acquired liens or rights by attachment or otherwise, gave him a title which was good at common law against creditors, and which would have been good against an assignee in insolvency under the statutes of Massachusetts, or against an assignee in bankruptcy under the United States Bankruptcy Act of 1867, yet under the Bankruptcy Act of 1898 the four months period dates from the acquisition of possession under the mortgage, and the defendant's taking possession of the mortgaged property as he did, constituted a preference voidable by the trustee under section 60*b*.

In *Re Ball, supra*, was a case in the District Court of Vermont. It was a case of a chattel mortgage covering after acquired property. The mortgage was executed long before the commencement of bankruptcy proceedings, but the mortgagee did not take possession of the after acquired property until within four months prior to the filing of the petition in bankruptcy, and she then had reasonable cause to believe that the mortgagor was insolvent. Judge Wheeler, in holding that such taking possession constituted a voidable preference within the meaning of sections 60*a* and 60*b* said: "The possession,

which was long within the four months, was the operative thing that would work a preference under 60 cl. 'a'; and such a preference is voidable by the trustee under clause 'b'. The preference, as such, was given by the bankrupt when his giving could be, and was carried into effect."

Applying such a rule to the case at bar the four months period began to run on May 16, 1900, the day on which the defendant took possession of the mortgaged property, and his taking possession of the mortgaged property on that day constituted a preference voidable by the plaintiff, as trustee, if he, or his agent acting therein, had reasonable cause to believe that it was intended thereby to give a preference.

The Supreme Court of Vermont held that there was no finding in the referee's report "that the defendant, or his agent, had reasonable cause to believe that by the change of possession it was intended to give a preference." *(Transcript of Record, p. 51)* But we maintain that there is such a finding in the report.

The referee found that although the defendant took possession of the livery property under his mortgage of April 15, 1891, with the consent of the bankrupt, and on June 11, 1900, caused the same to be sold at public auction by the sheriff, *(Transcript of Record, p. 13)*, yet, he further found that the arrangement between the defendant's attorney, who had the matter in charge, and the bankrupt and his attorney, was that the officer was to take possession of and sell the property under the defendant's mortgage, and hold the avails of the sale in place of the property for whoever turned out to be entitled thereto, and neither the bankrupt nor his counsel consented that the avails of the sale might be applied on the defendant's debt. *(Transcript of Record, p. 16)*. The referee further

found that at the time the officer so took possession of the livery property, the defendant knew that the bankrupt was insolvent and was considering going into bankruptcy, that Ryan had an attachment upon the property which would probably hold good as against his mortgage, and that he had the officer take possession with the intent thereby to perfect his lien on the livery property and make it available for the payment of his debt before other complications by way of attachment or bankruptcy arose, and when the officer sold the property he, the defendant, received the proceeds of the sale and applied them upon his debt. (*Transcript of Record, pp. 13, 15.*)

It is thus seen that while at the time the officer took possession of the livery property the bankrupt did not intend to prefer the defendant, yet the defendant while apparently agreeing that the officer should sell the property and hold the avails of the sale in lieu of the property for whoever might be entitled thereto, really intended by the officer's taking possession and selling the property to perfect his lien upon the property and make it available for the payment of his debt before the bankrupt went into bankruptcy, or other attachments were placed on his property.

The facts, we think, establish conclusively that the defendant had reasonable cause to believe that by the change of possession of the livery property a preference was intended.

Under the statute intent on the part of the debtor is not necessary, The requirements of the law are fulfilled if there is an intention on the part of the creditor who brings about or procures the transfer. If the transaction is conducted within the four months, and it has the effect to give the creditor who conceives and executes it a larger percentage of his claim than other creditors of the same

class it clearly comes under the ban of the law. In the case at bar the defendant knew that his own intention and purpose was to secure a preference by making his debtor's property available for the payment of his debt before the debtor went into bankruptcy. He clearly had reasonable cause to know that a preference was intended because he must have known and intended the consequences of his own acts.

Western Tie & Timber Co. vs Brown, (C. C. A.), 129 Fed. Rep. 728.

In that case one Harrison was adjudged a bankrupt on February 24, 1903. Prior to that time he conducted two stores and sold supplies to the laborers employed by the plaintiff. It was customary for the plaintiff to deduct from the wages due each workman the price of the supplies Harrison had furnished him, and send to Harrison the price of all the supplies he had furnished to the laborers. This course of dealing had been followed for many months prior to October 24, 1902, four months before the filing of the petition in bankruptcy. On that day Harrison owed to the plaintiff more than $20,000. During the month of December he applied to the plaintiff to advance him more money, and it refused his request. Thereafter when the pay rolls for December, 1902, and January and February, 1903, came in, the plaintiff, instead of sending to Harrison, as it had been accustomed to do, the price of the supplies which he had delivered to the men, credited him with this amount, which aggregated $2210.73, and in this way secured a payment of this amount upon its claim against him. The Court in holding that the transaction constituted a voidable preference said: "But an intention on the part of the insolvent to give a preference by means of a transfer which he makes is not always indispensable to its

existence. It is sufficient if he has given the preference, and the party receiving it has reasonable cause to believe 'that it was intended thereby to give' it. The statute does not require that it should be intended by the debtor, but is fully satisfied by the existence of an intention on the part of the actor—the person who procures, brings about, or effects the transfer. The preferences denounced by the statute are often secured by creditors without any desire or intention on the part of the debtors to give them, as in cases in which the creditors obtain judgments against their debtors over defenses made to the actions in good faith, and in cases, like that at bar, where, without the consent of their debtors, creditors appropriate to the payment of their claims the property of their debtors which happens to be under their control. Such transactions are none the less voidable preferences, that the debtors do not intend them to have that effect. If they are conducted within the four months, and if they have the effect to give to the creditors who conceive and execute them larger percentages of their claims than other creditors of the same class receive, they fall as clearly under the ban of the law as transfers made by debtors with the intent on their part to give the preferences. Such a transaction is voidable by the trustee not only when the party receiving it has reasonable cause to believe that it was intended by the debtor, but also when it was intended by the creditor, or by the actor who accomplished the result, to work a preference by means of the transaction. The tie company in this case had reasonable cause to believe that the transaction which it conducted was intended to give a preference over the other creditors of Harrison in its class. Indeed, it knew that this was the object of the transaction. It knew that its own intention and purpose was to secure

such a preference by applying the debt it owed to Harrison for the supplies in part payment of its large claim against him for money advanced, and it attained its object, at least temporarily. The transaction fell fairly within the terms of section 60, and it constituted a voidable preference."

The Supreme Court of Vermont, however, in deciding the case, ignored the fact that the bankrupt only consented that the property might be sold by the officer and the avails held by him in lieu thereof, and that he did not consent that the proceeds of the sale might be applied on the defendant's debt. That Court treated the case as though everything that the defendant did in making the livery property available for the payment of his debt was done with the express consent and approval of the bankrupt. *(Transcript of Record, pp. 50–53.)* But treating the case as that Court did, we maintain there is a finding in the referee's report that the defendant had reasonable cause to believe that a preference was intended.

At the time the bankrupt delivered the livery property to the defendant he was insolvent and contemplating bankruptcy, and the defendant knew this. The necessary and logical consequence of that act was to prefer the defendant over the bankrupt's other creditors, and such a transfer is conclusive evidence of an intent to prefer, as every man is presumed to intend the necessary consequences of his acts.

Toof vs. Martin, 13 Wall. 40.
Wager vs. Hall, 16 Wall. 584.
Goldman, Beckman & Co. vs. Smith, 93 Fed. Rep. 182.
In Re Rome Planing Mills, 96 Fed. Rep. 812.
In Re McLam, 97 Fed. Rep. 922.
Johnson vs. Wald, (C. C. A.) 93 Fed. Rep. 640.

In Re McGee, 105 Fed. Rep. 895.
In Re Bloch, (C. C. A.) 109 Fed. Rep. 790.
In Re Wright Lumber Co., 114 Fed. Rep. 1011.
Read vs. Moody, 60 Vt. 668.

In *Toof vs. Martin, supra*, this Court said: "It is a general principle that every one must be presumed to intend the necessary consequences of his acts. The transfer, in any case, by a debtor, of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him in such case, and not upon the assignee or contestant in bankruptcy," and in the case of *In Re Bloch, supra*, the Court said: "The fact of an intent sufficiently appears from the insolvency and the preference."

Since, therefore, the necessary and logical consequence of the bankrupt's act, in delivering all of his livery property to the defendant, was to prefer the defendant, and as the defendant, at that time, knew that the bankrupt was insolvent and contemplating bankruptcy, and as he intended, by taking the property as he did, to make it available for the payment of his debt before further complications by way of attachment or bankruptcy arose, he cannot now be heard to say that he did not have reasonable cause to believe that by such transfer of property a preference was intended.

In Re Wright Lumber Co., 114 Fed. Rep. 1011.

Furthermore the facts that at the time the defendant delivered his livery property to the defendant

he was insolvent, that he delivered his entire stock, that he was at that time contemplating bankruptcy, that the defendant knew all this, and by taking possession of the property intended to make it available for the payment of his debt before proceedings in bankruptcy were begun, necessarily include the further fact that at that time the defendant had reasonable cause to believe that by the change of possession of the livery property a preference was intended.

Lewis and Leach vs. Burlington Savings Bank, 64 Vt. 626.
Read vs. Moody, 60 Vt. 668.
Buchanan vs. Smith, 16 Wall. 277.
Wager vs. Hall, 16 Wall. 584.
Toof vs. Martin, 13 Wall. 40.
Sebring vs. Wellington, (N. Y.) 63 App. Div. 498.

Lewis and Leach vs. Burlington Savings Bank, supra, was assumpsit by the plaintiff, as assignees in insolvency of Albert Sowles, to recover the value of certain alleged preferences paid the defendant by Sowles within four months of the filing of the petition in insolvency. The alleged preference consisted in the payment of a debt within the four months preceding insolvency proceedings. The referee, before whom the facts were tried, found that at the time the payment was made the creditor had reasonable cause to believe the debtor was insolvent, but he did not find that the creditor had reasonable cause to believe that the payment was made in fraud of the insolvent law. The Court in holding that that fact was necessarily included in the findings of the referee said: "Then we have presented for consideration the question whether in the case of one who has received full payment of his demand, a finding that he had reasonable

cause to believe the debtor insolvent in the ordinary sense necessarily involves the fact that he had reasonable cause to believe that the payment was made in fraud of the insolvent law. It is evident that payment in full from one who has not the means to pay all his creditors in full must necessarily prevent that equal distribution of his assets which it is the object of the insolvent law to secure. Such a payment is, therefore, a payment in fraud of the law. It seems clearly to follow that when the payment received is payment in full, and the one receiving it has reasonable cause to believe that the payor is insolvent in the sense indicated, he has reasonable cause to believe that such payment is made in fraud of the law. The first two facts necessarily include the third."

In the other cases cited the Courts held that if the debtor was in fact insolvent as alleged, and that the means of knowledge were at hand, and that such facts and circumstances were known to the grantee as were clearly sufficient to put a person of ordinary prudence and discretion upon inquiry, it is well settled that it would be his duty to make all such reasonable inquiries to ascertain the true state of the case, and if he fails to investigate when put upon inquiry, he is chargeable with all the knowledge which it is reasonable to suppose he would have acquired if he had performed his duty in that regard.

The case at bar is much stronger than any of these cases, because here the defendant knew when he took possession of the livery property that his debtor was insolvent and considering going into bankruptcy, and he took possession of the property for the sole purpose of making it available for the payment of his debt before bankruptcy proceedings were begun.

We therefore maintain that all the essentials necessary

to render a transaction voidable under sections 60*a* and 60*b* were present in the transaction at bar, and that the decision of the Supreme Court of Vermont that the defendant's taking possession of the bankrupt's livery property on May 16, 1900, under his chattel mortgage of April 15, 1891, did not constitute a preference voidable by the plaintiff under section 60*b* of the Bankruptcy Act was erroneous and should be reversed by this Court.

VI.

The 14th, 15th and 16th errors assigned are that the Supreme Court of Vermont erred in holding that the defendant's taking possession of the bankrupt's livery property on May 16, 1900, under his chattel mortgage of April 15, 1891, was not a transfer of property rendered null and void under section 67*e* of the Bankruptcy Act of 1898.

The Supreme Court of Vermont held that there was no finding by the referee that when the bankrupt delivered the livery property to the defendant on May 16, 1890, "that the thus parting with the possession of the property by the mortgagor was with the purpose on his part to hinder, delay, or defraud his creditors, or any of them," and that "without a finding to this effect, it cannot be said that there was any invalid transfer of the property within the provisions of section 67*e*, of the Bankrupt Law." *(Transcript of Record, p. 50).*

It is true that the referee did not find that the bankrupt parted with the possession of his livery property with the intent to hinder, delay or defraud his creditors or any of them, on the contrary the referee found that the bankrupt never consented that the defendant might take possession of the livery property under his chattel mortgage of April 15, 1891, for the purpose of perfecting his

lien thereunder. The Supreme Court of Vermont, however, treated the case as though everything the defendant did in taking the livery property under his mortgage of April 15, 1891, and applying it upon his debt, was done with the consent, approval and aid of the bankrupt. *(Transcript of Record, pp. 50–53.)*

But treating the case as the Supreme Court of Vermont did the bankrupt did deliver the livery property to the defendant with the intent on his part to hinder, delay, and defraud his other creditors for that was the logical and legal consequence of his act, and as we have before stated, every man is presumed to intend the necessary consequence of his own acts.

Toof vs. Martin, 13 Wall. 40.
Wager vs. Hall, 16 Wall. 584.
Goldman, Beckman & Co. vs. Smith, 93 Fed. Rep. 182.
In Re Rome Planing Mills, 96 Fed. Rep. 812.
In Re McLam, 97 Fed. Rep. 922.
Johnson vs. Wald, (C. C. A.) 93 Fed. Rep. 640.
In Re McGee, 105 Fed. Rep. 895.
In Re Bloch, (C. C. A.) 109 Fed. Rep. 790.
In Re Wright Lumber Co., 114 Fed. Rep. 1011.

And as was said in the case of In Re Bloch, supra, "The fact of an intent sufficiently appears from the insolvency and the preference." There was therefore, a sufficient finding in the referee's report that the bankrupt parted with the possession of the livery property with the intent on his part to hinder, delay and defraud his creditors.

And if, as we have maintained, the four months began to run from the time when the defendant took the actual and notorious possession of the livery property, the

transfer was clearly within the provisions of section 67*e*, and was rendered null and void by the bankrupt's adjudication in bankruptcy, and the property would pass to the plaintiff, as the bankrupt's trustee.

Therefore, for the reasons above stated, we maintain that the decision of the Supreme Court of Vermont was erroneous and should be reversed by this Court.

EDWARD H. DEAVITT,

Attorney for the Plaintiff.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

No. 117

FRANK D. THOMPSON

TRUSTEE IN BANKRUPTCY OF

HERBERT E. MOORE, BANKRUPT

PLAINTIFF IN ERROR

vs.

HENRY FAIRBANKS

IN ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT

Defendant's Brief.

STATEMENT OF CASE.

April 15, 1891, Fairbanks, the defendant in error, took a chattel mortgage from Moore, the bankrupt, of his livery stock located in St. Johnsbury, Vermont. The property mortgaged is described in the mortgage as, "All my livery property, consisting of horses, wagons, sleighs, vehicles, harnesses, robes, blankets, etc.; also all horses and other livery property that I may purchase in my business or acquire by exchange."

At the time the mortgage was given, it was agreed and understood by the parties to it that Moore might sell or exchange any of the livery stock as he desired, and should thereby and by purchase or otherwise keep the stock good so that the defendant's security should not be impaired, and that all after acquired livery property should be covered by the mortgage as security for the debts specified therein.

The mortgage was conditioned to pay said Fairbanks all said Moore then owed him, or might thereafter owe him, on note, book account, or in any other manner, and save him, "harmless and indemnified from paying any commercial paper on which he has become, or may hereafter become, holden in any manner for my benefit as surety, endorser, or otherwise."

The mortgage was executed and recorded in compliance with the statutes of Vermont. The defendant had then incurred obligations on the bankrupt's commercial paper to aid him in purchasing the livery property to quite a large amount, which liability, by renewals, continued to May 16, 1900, when defendant took possession of the livery property, with bankrupt's consent, and foreclosed his mortgage. The bankrupt was then also owing

defendant between $200 and $300, most of which was then overdue. Moore continued in possession until May 16, 1900, when defendant took possession, and in the interim had by exchange or by purchase with the avails of the original livery property procured other livery property, so that the livery property taken possession of was mostly acquired subsequently to the execution of the mortgage. The exchanges were made sometimes with and sometimes without the advice and consent of the defendant. All the after acquired livery stock, as it existed on May 16, 1900, was acquired by exchange of the original stock, or with the avails of said stock sold, or the money derived from the business, and "was acquired by Moore with the full understanding and intent that it should be covered by defendant's mortgage of April 15, 1891."

The defendant took possession of the livery property, under his mortgage, not with intent to perpetrate any fraud on any of the other creditors, but with the intent to make the livery property available for the payment of his debt before other complications arose. June 11, 1900, defendant caused the property to be sold in the foreclosure of his mortgage by the sheriff. June 30, 1900, Moore filed a voluntary petition in bankruptcy, was adjudged a bankrupt, and Thompson was appointed trustee of his estate. Moore was insolvent as early as March 5, 1900. The referee found, on some testimony objected and excepted to by defendant, that the defendant and his attorney knew bankrupt was insolvent at the time defendant took possession of the livery property, May 16, 1900, but defendant's exception to this finding was sustained by county court, and judgment rendered for defendant to recover his costs. Thompson excepted to this judgment, which the Supreme Court affirmed, without

considering the admissibility of the testimony excepted to before the referee by defendant.

The plaintiff in error brought suit in the proper county court to recover the value of the property taken and sold by defendant under his mortgage, less the costs of the sale by the sheriff, being $922.08, which included what was received for two horses covered by the mortgage when executed, claiming that defendant's lien, under his mortgage and foreclosure proceedings, which were conceded to be regular, was invalid against the creditors of the bankrupt. The defendant pleaded the general issue, and gave notice under the statute of the existence of the mortgage April 15, 1891, of the foreclosure of the same, and of the receipt therefrom, less expenses of making the foreclosure, of $922.08. By consent of the parties, the cause was referred to a referee selected by the parties, who heard the case, found the facts, and reported to the court.

After the final judgment for the defendant in the Supreme Court of Vermont, the plaintiff brought this writ of error to have the claimed federal errors of the Supreme Court of Vermont heard by this Court. The defendant filed a motion, and a brief in its support, to have the writ of error dismissed for want of jurisdiction of the same by this Court.

ARGUMENT.

The defendant still insists upon his motion to dismiss, and asks that his brief already filed may be considered. In addition to the point taken in that brief, he submits other points.

1. The plaintiff has no personal interest in the subject matter involved in his suit, and hence is not entitled to a writ of error. He is trustee and representative of the bankrupt and his creditors. His only interest is that of an official.

Smith vs. Indiana ex. rel. Lewis, 191 U. S., 138, L. Ed., 48, 125.

Tyler vs. Registration Court Judges, 179 U. S., 405, 45 L. Ed., 252.

Turpin vs. Leman, 187 U. S , 51, 47 L. Ed., 70.

Lampassas vs. Bell, 180 U. S., 276, 45 L Ed., 527.

Ludeling vs. Chaffee, 143 U. S., 301, 36 L. Ed., 313.

Gilis vs. Little, 134 U. S., 645, 33 L. Ed., 1062.

2. The courts of Vermont, in trying and deciding the issue tendered by the pleadings, were not exercising jurisdiction in their behalf conferred by the constitution and laws of the State of Vermont, but were exercising jurisdiction conferred by the national bankrupt act of 1898, Section 23, *a* and *b*. The title of this section is, "Jurisdiction of United States and State Courts."

"Section 23 Jurisdiction of United States and State Courts:

a. The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy between trustees, as such, and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

b. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

By *b* of this section, the trustee was compelled to bring the suit in the state court.

Bardes vs. Hawarden, 178 U. S., 525; 44 L. Ed., 1175.

Wall vs. Cox, 181 U. S., 244; 45 L. Ed., 845.

He is the creature of the act, and derives all his authority and rights therefrom. National bankruptcy laws can only be enacted by Congress. The states have no power to enact them, nor to give their courts jurisdiction to try and determine any rights given by such laws. Hence, it follows that the national laws, giving this court the right in certain instances to review and revise the errors of state courts, have no application, and give this court no jurisdiction of this writ of error. Such is the manifest intention of the provisions of the act of 1898. Immediately following this section, section 24 treats of the jurisdiction of appellate courts, and section 25 of appeals and writs of error. The claim litigated must be $500 or over to entitle a party to an appeal, and over $2000 to entitle a party to a writ of error. These sections in terms relate to appeals and writs of error in United States courts; also given jurisdiction by the act to adjudicate matters and claims under it. But the courts where by section 23*b* the trustee is obliged to bring suits therein prescribed are by virtue thereof United States courts for the purposes there defined.

No other provisions are made for writs of error in the act of 1898. It therefore must follow that either no writs of error can be brought to review the decisions of state courts when acting under the authority conferred by the act, or the limitation that the amount in controversy must exceed $2000 must apply to cases brought under it in state courts, as well as cases brought in U. S. courts. This is the only conclusion that can be reached when all the provisions of the act on this subject are considered. Unless this be so, trustees under this act can flood this court with writs of error, claiming a federal question has arisen and been decided against them in the state courts exercising jurisdiction in Vermont under the

act of 1898, wherein the amount in controversy does not exceed $20: for claims of that amount brought before a justice of peace can be taken to the county courts, and thence by exceptions to the Supreme Court of the State.

If the amount in controversy in this case had been only $20, it would be somewhat startling to the profession, to the country, and to this court; also, if on the facts established, this court should find itself compelled to decide that the plaintiff was entitled to maintain a writ of error, and put the defendant to the expense of defending against it, after he had been to the expense of defending against the claim through all the courts of Vermont. The purpose of this and every bankrupt law is to gather and distribute to the bankrupt's creditors his property available for the payment of their debts as speedily and inexpensively as possible. It is commonly understood that section 23*b* is an amendent to the act as originally drawn to answer the objection that without it under *a* of this section, the trustee could put defendants in such suits to an unreasonable expense. If such was the reason and purpose for inserting *b*, it will be defeated wholly, if the trustee can bring defendants to this court on writs of error if he should claim in the state court that some provision of the act should have other and different force or application than given to it by the court in which the act compels him to try the question and construe the provisions of the act.

All provisions of a statute relative to the same subject matter are to be considered in determining what construction should be given to particular parts so as to effectuate reasonably the intent and purpose of the enacting power. The Act of 1898 gives jurisdiction to the state courts to try and determine federal questions, if they arise in such cases, and submit such questions to the determinations of

the state courts. Such trials and determinations are by virtue of the Act of 1898, and not by virtue of state constitution and laws. Hence, if the act makes no provisions for writs of error to this court in such cases, writs of error cannot be brought, and this court has no jurisdiction to entertain them.

Section 26, of the Act of 1898, provides for arbitration of controversies. Manifestly the trustee would not be entitled to a writ of error in this court to correct claimed errors in deciding federal questions arising in such arbitrations, because the act does not give him any such remedy. No more has he right to bring a writ of error under Section 23, *a.* and *b.* if the act does not give him such right.

When the trial and determination of such claims is by the United States Court, under the jurisdiction given by Section 23, *a.* and *b.*, provision has to be made for writs of error in case federal questions arise and the amount in controversy exceeds $2000. This provision is useless if they can be brought without some provision of the act. This court would be without jurisdiction to entertain them unless authorized by this provision. Unless this provision applies also to determinations of state courts given jurisdiction to try and determine such claims by this act, then there is no power given this court to entertain them. If this provision applies to trials in state courts, then, this writ must be dismissed for the amount in controversy is less than $2000.

3. Under the pleading, the trustee assumed the burden of establishing that the money in the defendant's hands, received from the foreclosure of his mortgage of April 15, 1891, should be paid to him for distribution among the creditors of the bankrupt. By bringing general assumpsit in the common courts he sues for this money as money had

and received by the defendant for his benefit, on the assumption that it came regularly and rightfully to the defendant for him. The defendant alleges that this money belongs to him to pay what the bankrupt owed him, and to secure him for liabilities which he incurred for the bankrupt before or at the time the bankrupt gave him the chattel mortgage of April 15, 1891, through the foreclosure of which this money came to him. One of the bankrupt's creditors had attached some of the property from which the money came before the defendant took possession and recovered this money through the foreclosure of his mortgage. This attachment became void by the adjudication of bankruptcy being made within four months of the filing of the petition to have him adjudicated a bankrupt. If this creditor acquired any rights, he acquired them for himself alone. None of the other creditors of the bankrupt made any move to acquire any rights in this property before defendant took possession. The bankrupt did no act that gave any of his creditors any rights in the property the defendant took possession of. The defendant's mortgage, in all respects, was executed and recorded as required by the laws of Vermont, and was a valid mortgage of the two horses which remained of the original property mortgaged, without defendant's taking possession. Possession was only necessary, at most, of the after acquired livery property. The record of the mortgage was constructive notice in regard to the property covered by it to all who undertook to gain any rights to such property. All the bankrupt's creditors must be held to have notice of the defendant's mortgage and contents in regard to the after acquired property. The defendant contended in the Supreme Court of Vermont, that under its decisions the defendant's mortgage was valid in regard to the after acquired property without defendant taking possession of

the same, as shown by his brief in that court. The Supreme Court of Vermont, without deciding this contention, held it was good by his taking possession of the after acquired property, before any lien, or right of any of bankrupt's creditors that became fixed, had intervened. By the decisions of the State of Vermont in regard to after acquired property, made years before the Bankrupt Act of 1898 was enacted, it had become the settled law of the state that a chattel mortgage which covered original and after acquired personal property was good and valid between the parties, and could at any time, except as to intervening rights, be made good against anybody by the mortgagee taking possession of the after acquired property.

(See Vermont cases hereinafter cited.)

Under the Bankruptcy Act of 1898, the trustee could only bring suit for the recovery of this property in the state court.

Bardes vs. Hawarden Bank, 178 U. S., 534.

Wall vs. Cox, 181 U. S., 244.

In the suit which he did so begin, the highest court of the state has given final judgment against him. The Bankruptcy Act itself provides no method for reviewing that judgment in this court. A federal question must have been presented, must have been decided adversely to the plaintiff in error, and the judgment of the state court must necessarily have rested upon that decision, in any event, to give him such right.

The Vermont court held that the Fairbanks mortgage of 1891, was a valid common law mortgage on the after-acquired property; that while such a mortgage might not be valid on the after-acquired property if other rights had intervened and became fixed before the defendant took possession under his mortgage, he having taken possession under it before such right had intervened and

become fixed, the mortgage gave the mortgagee the right of possession, and that by taking such possession his title under the mortgage was valid, and related back to the date of the mortgage itself. If no stipulation in the mortgage to the contrary, the mortgagee has the right to take possession any time under his mortgage. By such taking possession, after-acquired goods came under cover and operation of mortgage as of its date.

McLeod vs. Wakefield, 70 Vt., 558.
Longey vs. Leach, 57 Vt., 377.
Enright vs. Dodge, 64, Vt., 502.

The following is the language of the Supreme Court of Vermont upon this point.

"The referee found that at the time this mortgage was given, it was agreed and understood by the parties thereto, that the mortgagor should sell or exchange any of the livery stock covered by the mortgage as he desired, and should thereby and by purchase or otherwise keep the stock good so that the defendant's security should not be impaired; and that all after-acquired livery property should be covered by the mortgage as security for the debts specified therein; that pursuant to such understanding and agreement, the mortgagor made sales, purchases, and exchanges of livery stock to such an extent that on May 16, 1900, when the defendant took possession of the property under his mortgage, there only remained two certain horses of the property on hand at the time the mortgage was given; that these sales, exchanges and purchases were made by the mortgagor, sometimes without communication with or advice from the defendant, and frequently after consultation with him; that the livery stock as it existed when the defendant took possession of it was all acquired by exchange of the original stock or with the avails of the old stock sold,

or the money derived from the business; and that all the property of which the defendant took possession was acquired by Moore with the full understanding and intent that it should be covered by the defendant's mortgage.

The property expressly described in the mortgage was the mortgagor's livery property and the after-acquired property was, by the description, all horses and other livery property that he might purchase in his business or acquire by exchange. In principle there is no difference between a mortgage on such livery property, with acquisitions by purchase or exchange to keep the property in quality and value equal to what it was when the mortgage is given, and a mortgage on a stock of goods with acquisitions by purchase to keep the stock from depletion by sales in the common course of business. That the mortgage in question is good at common law between the parties to it, and that when the mortgagee took possession of the property under it with the consent of the mortgagor, it became a good and valid mortgage on the property, including that acquired subsequent to the giving of the mortgage, except as against intervening rights of creditors or other third persons, if any, and that such property came under the cover and operation of the mortgage as of date, are questions too well settled in this state to need further discussion.

Peabody vs. Landon, 61 Vt., 318.
15 Amer. St. Rep., 903.
Rice's Assignee's vs. Hulett, 63 Vt., 321.
In re Allen's Estate, 65 Vt., 392.
McLoud vs. Wakefield, 70 Vt . 558."

The Vermont court held, therefore, that Fairbanks had title to this property as of April 15, 1901. This holding depended entirely upon the construction of the

state law, and is not reviewable by this court. If correct, it disposes of the case, for a title acquired in 1891 could not be affected by proceedings in bankruptcy begun in 1900. This entitled the defendant to judgment in his favor for the money in controversy. Whatever the Vermont court said later in its opinion as to the application of certain provisions of the Bankruptcy Act was entirely unnecessary to the judgment finally rendered by that court. Hence, this court has no jurisdiction, even though the state court did discuss a federal question, and did decide that the contention of the plaintiff in error was inapplicable.

> "It is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a state in which a decision in the suit could be had, it must appear affirmatively not only that a federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause and that it was actually decided or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on an independent ground, not involving a federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any federal question that may also have been presented."
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> California Powder Works vs. Davis, 151 U. S., 389, 393.
>
> Eustis vs. Bolles, 150 U. S., 361.
>
> Rutland Railroad Co. vs. Central Vt. R. R. Co., 159 U. S., 630.
>
> Harrison vs. Morton, 171 U. S., 38.

The point passed upon by the Vermont court as above concerns the title of Fairbanks to the property, not the effect of bankruptcy proceedings upon that title; but this

holding is decisive, for if he had such title as the court declared, there is no possible theory upon which bankruptcy could affect it.

Scott vs. Kelley, 89 U. S., 57.

The trustees' writ of error should be dismissed.

4. If this court has jurisdiction of this writ of error, the Supreme Court of Vermont committed no error in disposing of the federal questions, if any, therein raised by the plaintiff. What were the rights of the defendant under his mortgage of April 15, 1891, is determined by the laws of Vermont, interpreted by its Supreme Court, and is not reviewable in this court.

a. The defendant contended that by one course of decisions of the Supreme Court of Vermont, the defendant's mortgage was valid against all interests without his taking possession of the after acquired property under his mortgage. The Supreme Court of Vermont in its decision neither adopted nor denied this contention. If it is sound, under the decisions of Vermont Supreme Court, no federal question could be raised in regard to the validity of the rights of the defendant under his mortgage for it fully covered the existing and after acquired property from its execution, and all which the defendant did under it to bring the money in controversy into his possession and make the money his own, were acts of foreclosing a mortgage valid from its execution of the after acquired property.

The defendant's contention on this point was as follows:

"The chattel mortgage of April 15, 1891, was valid as to all of the property sold by the sheriff, not alone between the parties to it, but as against attaching creditors and purchasers. Livery property is kept for use as a going concern unlike the property mortgaged in Peabody vs. Landon kept for sale to secure a profit. In prin-

ciple it is like the personal property involved in Paris vs. Vail 18 Vt., 277. All the property sold had a potential existence when the mortgage was executed and recorded as required by law. The referee has found that 'the livery stock as it existed on May 16, 1900, was all acquired by exchange of the original stock, or with the avails of the old stock sold, or money derived from the business,' that is, from its use. Every article of the acquired livery property came from the old livery stock and was potentially in it. It was also strictly within the terms of the mortgage and the understanding of the parties of the manner in which Moore should conduct and manage the livery property. Every horse, carriage and other article of the livery stock as it existed May 16, 1900, came in the course stipulated to be pursued, from the livery stock as it existed April 15, 1891, as much, and more so than crops which have to be sown and raised from real estate, or the progeny of mares and cows which have to be bred and cared for by man, or the butter and cheese produced from cows by the labor and care of the dairyman, or the belts and parts of machines and machinery which become worn and have to be replaced with new, or the rolling stock of railroads which becomes worn by use and is replaced by new, or repaired engines and cars. Yet in all these cases it has been held that the after produced articles coming from the proper handling and management of the property originally mortgaged were potentially in the original when mortgaged, and not property in the eye of the law which did not exist when the mortgage was executed.

Smith vs. Atkins, 18 Vt., 461.
Bellows vs. Wells, 36 Vt., 599.
Brainard vs. Peck & Colby, 34 Vt., 496.
Paris vs. Vail, 18 Vt., 277.
Baxter vs. Bush, 29 Vt., 465.

"In Bellows vs. Wells, supra, the mortgage of the crops to be grown on the leased premises to secure the payment of the rent was not given until a year after the lease was given. The crops mortgaged could not have been reserved in the lease. Notwithstanding this, and that the point was made that to be a valid mortgage of cultivated crops, against attaching creditors, the mortgagee must have taken possession before the attachment was made, this court held the mortgage to be a valid mortgage against such attachment. In Allen's Estate, 65 Vt. 395, Taft, Judge, defining what property may be mortgaged, says the general rule is 'that a mortgage of chattels can operate only on property actually in existence at the time of giving the mortgage, and then actually belonging to the mortgagor or potentially belonging to him, as an incident of other property then in existence.'

"Moody v. Wright, (13 Metcalf 17), 46 American Decisions 706 and note. 'Things not having an actual existence but having a potential existence, i. e., things which are the natural product or increase of something already existing and the property of the mortgagor, may be the subject of a valid mortgage.'

"The case of Mitchell v. Winslow, 2 Story 230, is a leading American case upon this subject. A mortgage was given in that case by two manufacturers of cutlery upon all the tools and machinery in their manufactory, and upon all the tools and machinery which they might purchase within four years, and all stock that they might manufacture during the same time. It was held to create a good, equitable lien and was protected as such under the Bankrupt Act. At page 644 Story, J., said: 'It seems to me a clear result of all the authorities, that wherever the parties, by their contract, intend to create a positive lien or charge, either upon real or personal

property, whether then owned by the assignor, or contractor, or not, or, if personal property, whether it is then in *esse* or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto against the latter, and all persons asserting a claim thereto under him, either voluntarily, or with notice, or in bankruptcy.'

Gregg v. Sanford, (24 Ill., 17,) 76 Am. Decisions 719 and note.

"'After acquired property may be mortgaged, and it will be subject to the mortgage lien if the mortgage deed be properly executed, acknowledged and recorded, or if possession be taken of the property before any other lien has attached.'

Peabody v. Landon, (61 Vt. 318;) 15 Am. St. Reports 803, and extended note.

Francesco v. Ryan, (54 Ohio State 307;) 56 Am. St. R. 711, and note."

If the mortgage covered all the property described in it as contended on this point, the bankrupt's creditors neither had nor could acquire any interest in the property described therein.

b. The mortgage of April 15, 1891, gave the defendant the right to take possession of the after acquired livery property at any time, whether the debt and liability secured were under or over due, without the consent of bankrupt.

Landon vs. Peabody, 61 Vt. 318.

Langey vs. Leach, 57 Vt. 377.

McLeod vs. Wakefield, 70 Vt. 558.

It created a lien on all the property described in it, after acquired, as well as that existing when the mortgage was given. Its record was notice of its terms to all who undertook to act with reference to the property. It

was *prima facie* bona fide and valid against the bankrupt and his creditors and placed on them, if they would acquire any rights therein, the burden of establishing that it was fraudulent. The only badge of fraud that could be relied upon by bankrupt's creditors if they attached the after acquired property, was the fact that it remained in bankrupt's possession. When defendant took possession before the creditors of the bankrupt attached the after acquired property, this badge was removed and thereafter the burden was on the plaintiff to establish there was actual fraud in giving the mortgage, and that it was given, to give the defendant a preference or to hinder or delay his creditors in securing payment of their debts, neither of which are established by the plaintiff.

See cases last above cited.

The defendant's contention, on this point, in the State Court was as follows, and is here produced that the language of the opinion may be more readily understood. "The mortgage of April 15, 1891, between the parties, was a valid agreement to place the after acquired livery property under the terms of the mortgage, and created an equitable lien thereon. By purchasing the after acquired property with the mortgaged property, or its avail, and by placing and using it in the livery stock, the bankrupt placed it under the operation of the mortgage. The defendant, by taking possession of it by force of the mortgage, accepted it as included in the mortgage, as of the date of the mortgage. Besides, the placing of the after acquired property with the original property with the intent, found by the referee, to have the mortgage operate thereon, the bankrupt did acts beneficial to the defendant, and the law presumes that the defendant accepts them even without the defendant's taking possession. The record of the mortgage in terms applying to the after acquired

property was constructive notice to all Mr. Moore's creditors, and all who might have dealings with him in regard to it, that the after acquired property was pledged to the defendant to secure and indemnify the defendant against all liabilities assumed by him for Mr. Moore. The defendant's existing liabilities for Mr. Moore when the mortgage was executed, and which remained when the mortgage was foreclosed, far exceed the amount received from the foreclosure of the mortgage. This court in Peabody v. Landon, 61 Vt. 318 (page 329), held, "When so taken possession of before seizure by other creditors, the goods come under the cover and operation of the mortgage as of its date." Judge Wheeler so says in his opinion, denying the trustee's petition to have Ryan's attachment kept on foot for the benefit of the bankrupt's estate. By the adjudication in bankruptcy that attachment was dissolved and did not disturb the operation of the mortgage upon the livery stock. The fact that the defendant knew that Moore was insolvent and "considering bankruptcy," cannot defeat the effect of the act of the defendant in taking possession under the mortgage, when it is found by the referee that thereby "the defendant did not intend to perpetrate any actual fraud on the other creditors or any of them, but he did intend thereby to perfect his lien on the livery property and make it available for the payment of his debts before other complications by way of attachment or bankruptcy arose." At that time there was no petition filed to have Moore adjudged a bankrupt, and no certainty that there ever would be any. Taking possession with these intentions, the defendant was doing no more than he had a lawful right to do. In other words, he was exercising his lawful rights as determined by the mortgage, and no more. The fact that he knew Moore was insolvent did not bar the

defendant from exercising his lawful rights created by the mortgage, more than six years before that time. It is evident Judge Wheeler so thought when he denied the trustee's petition to have Ryan's attachment kept on foot; but as the facts before him did not show that defendant's debt and liabilities, except, possibly, for a small amount, existed more than four months before Moore's petition in bankruptcy was filed, he thought it was doubtful if the defendant could, within four months of the filing of bankrupt's petition, create the indebtedness or come under the liabilities secured by the mortgage, and make the mortgage valid against other creditors by taking possession within the four months, having knowledge that Moore was insolvent,—a very different question from the one now presented for the consideration of this court. Under the facts found by the referee, the taking possession of the after acquired livery property by the defendant and the consent given thereto by the bankrupt himself, was not a preference under the bankrupt act. While the possession was taken within the four months of the filing of the voluntary petition by Moore to be adjudged a bankrupt, it was all done in accordance with the terms of the mortgage of April 15, 1891, and the rights of the defendant under it. These rights originated more than eight years before the petition was filed. On the facts, this is a stronger case against a preference than Sabin vs. Camp, 98 Fed. R. 974. The head note of that case is as follows: "A transfer of property to a creditor by a debtor within four months prior to his adjudication as a bankrupt does not constitute a preference under the bankrupt law in the absence of fraud where the transfer was made pursuant to the terms of a prior contract under which the transferee advanced money with which property was acquired, reserving a lien thereon and an option, in

case of default in payment to purchase the property at a fixed price, deducting therefrom his advances."

To the same effect are:

In Re E. M. Chapman, 3d B. K. R. 607.

Chattanooga Nat. Bank vs. Roane Iron Co., 102 Fed. R. 755.

3 Pom. Eq. Jurisprudence, Secs. 1236, 1283, 1288, note 3.

Walker vs. Brown (165 U. S. 654) 41 L. Ed. 865.

Ketchum vs. St. Louis (101 U. S. 306) 25 L. Ed. 999.

Paris vs. Vail, 18 Vt. 277. See Opinions Redfield and of Ch. J. Williams.

Coty vs. Barnes, 20 Vt. 78.

5. The Supreme Court of Vermont, in its determination the questions which were passed upon by it, touching the bankruptcy proceedings, properly, correctly and legally construed the provisions of the bankruptcy act of 1898, so far as the plaintiff in error raised such questions in that Court, and this Court has no jurisdiction to review any others. The record does not show that any others were raised.

a. The Court held that the Ryan attachment which was made within four months of the filing of the petition in bankruptcy, was void, as well as the Passumpsic Savings Bank mortgage under the provisions of the bankrupt law.

This decision was in exact accord with the provisions of Sec. 67 bankrupt law of 1898.

The plaintiff in error urged that with the annulment of the Ryan attachment the property affected by it passed to the trustee, as a part of the estate of the bankrupt under the express provisions of Sec. 67*f*.

This was the only question raised by the plaintiff in

error on the trial in the Supreme Court touching his rights under the Ryan attachment. He made no claim there, under the Passumpsic Savings Bank mortgage, and none was passed upon by the Supreme Court.

The plaintiff in error having first elected to make his application to the Court of bankruptcy for an order from that Court, that the attachment lien be preserved for the benefit of the estate, and that application having been denied, the Court of Vermont was correct in holding that unless the attachment lien is preserved by an order of the Court, the property, "as in the case at bar, may be held upon some other lien, and not passed to the trustee."

In Re Sentenne & Green Co., 120 Fed. R. 436.

Pages 31, and 32 of the record.

b. The Supreme Court of Vermont held that there was no finding of fact, "that the bankrupt's parting with possession of the mortgaged property was with the purpose on his his part to hinder, delay, or defaud his creditors, or either of them," and that without a finding to that effect it cannot be said that there was any invalid transfer of the property within the provisions of Sec. 67*e* of the bankrupt law.

The case of Sabin vs. Camp, 98 Fed. 974, and Meys vs. Fritton, 87 U. S. 414, 22 L. Ed. 389 are authorities for such decision.

c. What is a preference under the Bankrupt Act of 1898?

In determining whether taking possession and the foreclosure of the mortgage of April 15th, 1891, was a preference under the Act of 1898, its following provisions should be considered. Section 3, defining Acts of Bankruptcy, subdivision (3) reading, "Or suffered or permitted while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five

days before a sale or final disposition of any property affected by such preference vacated or discharged such preference."

Sec. 60*a*, "A person shall be deemed to have given a preference if, being insolvent he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

Sec. 67, Liens a. "Claims which for want of record or for other reason would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

c. "A lien created by or obtained in or pursuant to any suit or proceeding at law or in Equity, including an attachment upon, mesne process, or a judgment by confession which was begun against a person within four months, before filing of a petition in bankruptcy by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained or permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act.

d, Liens given or accepted in good faith and not in contemplation of or in fraud upon this act and for a present consideration which has been recorded according to law if record thereof was necessary in order to impart notice shall not be affected by this act." Last sentence

of e "And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him and while insolvent which are held null and void as against the creditors of such debtor by the laws of the State, territory or district in which such property is situated, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of bankrupt."

Impliedly the converse of this must be true.

f, "That all levies, judgments, attachments, and other liens obtained through legal proceedings against a person who is insolvent, at any time within four months, prior to the filing of a petition in bankruptcy against him shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged or released from the same and shall pass to the trustee as a part of the estate of the bankrupt unless" etc., "provided that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment or other lien of a bona fide purchaser for value who shall acquire the same without notice or reasonable cause for inquiry."

These are all the provisions of the act that have any bearing upon the question in this case. They are all to be considered in determining what under them is a legal preference. The crucial point of them all is when did the mortgage become operative upon the after acquired property? The Supreme Court of Vermont has held and announced repeatedly that such mortgages become operative if possession is taken by the mortgagee, as of

its date, certainly as soon as the property was acquired. Under this holding the bankrupt did not not suffer nor permit under subdivision 3 of section 3 the defendant to obtain a preference, after he was insolvent. So, too, were all the changes in the livery stock, so far as found, before he became insolvent. It is found by the referee that he became insolvent "Shortly prior to March 5th, 1900," and no changes were made in the livery stock after that date, is also found by him. The defendant had the right to take possession of the livery stock, a right given to him under the mortgage when it was executed. Hence the bankrupt could not suffer or permit what defendant had for years had a legal right to do.

Nor was this act under section 60*a*, a preference, for the bankrupt while insolvent neither suffered nor permitted the foreclosure of the mortgage,—that was authorized by the statute—nor made a transfer of any of the property while he was insolvent. This also had its origin long before he was insolvent. Nor did the foreclosure of the mortgage give defendant any greater percentage of his debt and liability "than any other of such creditors of the same class."

The lien created by the mortgage on this livery stock was duly recorded according to the statute and is not void against creditors for that or any other reason under section 67*a*; nor under (c) for it was a proceeding in equity begun when the mortgage was duly made and recorded; that was the commencement of the equitable proceeding which culminated in the sale of the property and payment of the nine hundred and twenty-two dollars and eight cents to the defendant; a proceeding begun years before instead of within four months of filing the petition in bankruptcy, and when the bankrupt was entirely solvent.

The lien created by the mortgage when bankrupt was solvent is declared valid by Section 67*d*. It was given and accepted in good faith not in contemplation of or in fraud upon the act and for a consideration then rendered by the defendant, the lending of defendant's credit to the bankrupt by which he was enabled to purchase the livery stock.

The Supreme Court of Vermont has repeatedly declared such mortgages and proceedings good against the insolvent law of the State and therefore impliedly valid under the last sentence of 67*f*. It was a lien acquired by defendant as a bona fide purchaser for value without notice or reasonable cause for inquiry.

The cases relied upon by the plaintiff in error, Mathews vs. Hardt, 9 Am. Bk. R. 375; Tatman vs. Humphrey, 184 Mass. 361, and the other cases cited by him are not in principle analogous to the case at bar. In those cases the lien was a secret lien, existing solely between the parties, and not one created by a legally executed and recorded chattel mortgage. In those cases there was no lawful written instrument signed and sworn to by the parties and placed on record when the bankrupt was solvent for notice to all creditors and purchasers which was the original process, and constituted the beginning of the equitable proceedings, as is true in this case, and which later, when the bankrupt had become insolvent, culminated by the ordinary operations of law, in the legal sale of the property specified in the mortgage, and the passing over of the avails of the sale to the mortgagee, to satisfy in whole or in part only, as in this case, the indebtedness and liabilities which the mortgagee assumed in reliance upon it when the mortgage was given, and when the property sold was the very property on hand when the mortgage was given or property procured with that

property by exchange, or with money which came from its use or sale.

The case at bar contains all the elements specified which are lacking in the cases cited by the plaintiff.

The Supreme Court of Vermont correctly disposed of the questions of the claimed preference in accordance with the decisions of this Court. We quote from the opinion, pages 34, 35, and 36 of the record:

"There is no finding that the defendant or his agent had reasonable cause to believe that by the change of possession it was intended to give a preference. This fact must affirmatively appear. We cannot infer it from the other facts reported. Darby vs. National Bank, 57 Vt. 52 370. The fair construction of the findings is that the parties were but carrying out the provisions of the contract of mortgage as it was well understood between them before the bankrupt act was passed, with a view to their respective rights under the contract, rather than any preference was intended by either. Nor does the property covered by defendant's mortgage pass to the trustee under the provisions of subdivision f, whereby all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him are deemed null and void in case he be adjudged a bankrupt, and the property affected thereby is deemed wholly discharged and released from such lien and passes to the trustee as a part of the estate.

The question of intent does not arise under these provisions, but to come within them the lien in question must have been obtained through legal proceedings within the prohibited period. It cannot be said that the creation of a lien is the same as the enforcement of one already creat-

ed. Assuming that the taking and sale of personal property by a public officer upon a statutory chattel mortgage under the provisions of V. S. 2265-2268, constitutes a legal proceeding within the meaning of the above provisions of the bankrupt law, as was recently held by Wheeler, J., in the matter of Parker P. Ball, bankrupt, 123 Fed. 164, it does not follow that the mortgage lien is thereby rendered null and void; for instead of being a lien obtained through such legal proceedings, it is an existing lien by constract enforced by them.

As already seen, the defendant's lien under this mortgage at common law was one that gave him an absolute legal title after forfeiture, which occurred before possession was taken by him. But it was necessary that a change of possession be had to render his title operative
53 against the other creditors of the mortgagor. Tobias vs. Francis, 3 Vt. 425; Woodward vs. Gates, 9 Vt. 358; Rice's Assignees vs. Hulett, before cited. After forfeiture the defendant had the right to sell the property in satisfaction of his debts. Wood vs. Dudley, before cited. Jones Chat. Mort. s. 707; Freeman vs. Freeman, 17 N. J. Eq. 44. And the sale, being with the mortgagor's consent, operated as a formal foreclosure of his equitable right of redemption. Jones Chat. Mort., s. 709.

The construction of section 67 f, has recently been under consideration in the case of Metcalf vs. Barber, 187 U. S. 165; 9 Am. B. R. 36. In an opinion delivered by Mr. Chief Justice Fuller, the Court said: "In our opinion the conclusion to be drawn from this language is that it is the lien created by a levy, or a judgment or an attachment, or otherwise that is invalidated, and that where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void an adjudication, but its validity is recog-

nized. When it is obtained within four months, the property is discharged thereupon, but not otherwise. A judgment or decree in enforcement of an otherwise valid preexisting lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens. If this were not so, the date of the acquisition of a lien by attachment or creditor's bill would be entirely immaterial."

Nor is the case of Wilson vs. Nelson, 183 U. S. 191, 46 L. Ed. 147, upon which the plaintiff relies, to the contrary. There Nelson borrowed the sum of money before the bankrupt law was enacted, and gave his promissory note therefor with an irrevocable power of attorney executed by him attached thereto authorizing any attorney of a court of record in his name to confess judgment thereon after its maturity. After the passage of the bank-
54 rupt act, the owner of the note caused judgment to be entered upon the note and the warrant of attorney. Upon this judgment an execution was issued and the same was levied on Nelson's goods which were subsequently sold, and the proceeds were applied in part payment of the judgment. These proceedings were wholly without Nelson's knowledge or consent. More than five days after the levy, but before the sale of the goods, a petition in bankruptcy was filed against Nelson, and the sole question before the court was whether he had committed an act of bankruptcy within the meaning of sec. 3, cl. 3, of the bankrupt law. In considering the case, the court discussed to some extent the provisions of sec. 67 subdivision f. In that case, unlike the one at bar, no lien existed upon the bankrupt's property until one was created by the levy of the execution, which brought it expressly within the terms of subdivision f. It is there said that the bankrupt act makes the result obtained by

the creditor, and not the specific intent of the debtor, the essential fact; and that the levy, which was in a proceeding begun within the four months, would be dissolved by the adjudication in bankruptcy because its existence and enforcement would work a preference; and it was held that the debtor, by failing to vacate or discharge the preference within five days before the sale of the property on the execution, committed an act of bankruptcy."

So far as the record discloses the plaintiff in error made no claim in the Supreme Court of Vermont, that under the claimed agreement between the respective attorneys for the bankrupt, and the defendant, that the fund to be realized from the sale of the mortgaged property, was to be held by the officer in place of the property and paid over to whoever might be entitled to the same, nor that the defendant was a party to such arrangement or ever had any knowledge of the same, nor that his rights were in any way affected by such claimed agreement.

The Court in Vermont did not pass upon any such question, nor so far as the record discloses was it called upon so to do, and so that question is not open for review by this Court.

Under the decisions cited this question is immaterial as the defendant had the legal right to take possession of the mortgaged property as he did without the consent of the bankrupt. The possession is the important matter for consideration upon this branch of the case. It was conceded on trial, and found by referee that all the proceedings in the foreclosure of the mortgage of April 15, 1891, were strictly in compliance with the law of the State of Vermont, Vermont Statutes, Secs. 2264, to 2268.

CHARLES A. PROUTY,
HARRY BLODGETT,
JONATHAN ROSS,
Attorneys for the defendant.

Supreme Court of the United States.

No. 117.—October Term, 1904.

Frank D. Thompson, Trustee in Bankruptcy of Herbert E. Moore, Bankrupt, Plaintiff in Error, *vs.* Henry Fairbanks.	In error to the Supreme Court of the State of Vermont.

[February 20, 1905.]

The plaintiff in error, by this writ, seeks to review a judgment of the Supreme Court of the State of Vermont in favor of the defendant in error. (75 Vt. 361.) The facts upon which the judgment rests are as follows: On the 30th day of June, 1900, Herbert E. Moore, of St. Johnsbury, in the State of Vermont, filed his voluntary petition in bankruptcy in the United States District Court for the District of Vermont, and on the 3d day of July, 1900, Moore was by the court duly adjudged a bankrupt, and on the 15th of September, 1900, the plaintiff in error was appointed a trustee in bankruptcy of Moore's estate, and duly qualified. He commenced this action in the County Court of Caledonia County, in the State of Vermont, on the first Tuesday of June, 1901, against the defendant Fairbanks, to recover from him the value of certain personal property alleged to have belonged to the bankrupt Moore on the 16th day of May, 1900, and which was, as alleged, sold and converted by Fairbanks, on that day, to his own use, the value of the property being $1,500, as averred in the declaration. The defendant filed his plea and gave notice that upon the trial of the case he would give in evidence and rely upon, in defence of the action, certain special matters set up in the plea. The case was, by order of the County Court, and by the consent of the parties, referred to a referee to hear the cause and report to the court. It was subsequently heard before the referee, who filed his report, finding the facts upon which the decision of the case must rest. He found that before June, 1886, the bankrupt Moore bought a livery stock and business in St. Johnsbury village, in the State of Vermont. At the time of this purchase the defendant was the lessor of the buildings in which the business was conducted, and it continued to be carried on in those buildings. Moore, in making the purchase, had assumed a mortgage then outstanding on the property, and a short time before March 1, 1888, the defendant assisted him to pay this mortgage by signing a note with him for $1,425, payable to the Passump-

sic Savings Bank of St. Johnsbury. Subsequently defendant signed notes, which, with accrued interest, were merged in one dated March 1, 1900, for $2,510.75, due on demand to said savings bank, signed by the bankrupt and by the defendant as his surety. This note had not been paid when the case was referred to the referee. The defendant also signed other notes payable to the First National Bank of St. Johnsbury, which were merged into one, and by various payments made by Moore, it was reduced to $525, and on June 4, 1900, it was paid by the defendant. All these notes had been signed by the defendant to assist Moore in carrying on, building up and equipping his livery stable and livery business, and as between them the notes belonged to Moore to pay. On April 15, 1891, Moore gave the defendant a chattel mortgage on the livery property to secure him for these and other debts and liabilities. The property was described in the mortgage as follows: "All my livery property, consisting of horses, wagons, sleighs, vehicles, harnesses, robes, blankets, etc., also all horses and other livery property that I may purchase in my business or acquire by exchange."

The condition contained in the mortgage was, that if Moore should "well and truly pay, or cause to be paid, to the said Henry Fairbanks all that I now owe him, or may owe him hereafter by note, book account, or in any other manner, and shall well and truly save the said Henry Fairbanks harmless, and indemnify him from paying any commercial paper on which he has become or may hereafter become holden in any manner for my benefit as surety, endorser or otherwise, then this deed shall be void, otherwise of force."

This mortgage was acknowledged and the affidavit as provided by the Vermont statute was appended, showing the justice of the debt and the liability contemplated to be secured by the mortgage, and the mortgage was duly recorded on the 18th day of April, 1891, in the St. Johnsbury clerk's office by the town clerk thereof. On March 5, 1900, Moore gave the defendant another chattel mortgage on this livery stock, which, on March 23, 1900, defendant assigned to the Passumpsic Savings Bank, and that bank has ever since been its holder and owner. This mortgage was given to secure defendant against all his liabilities for Moore.

On the 7th of May, 1900, one John Ryan sued out a writ in assumpsit against Moore to recover some $500, and an attachment on the livery stock was levied in that suit by the deputy sheriff. This attachment remained in force until dissolved by the bankruptcy proceedings, and the suit is still pending in the State court of Vermont.

Under the agreement contained in the chattel mortgage of April, 1891, Moore made sales, purchases and exchanges of livery stock to such an extent that on March 5, 1900, there only remained of the livery property on

hand April 15, 1891, two horses. These sales, exchanges and purchases were sometimes made by Moore without communication with or advice from the defendant, and frequently after consultation with him. The livery stock, as it existed on May 16, 1900, was all acquired by exchange of the original stock or with the avails of the old stock or from the money derived from the business. Some years after the execution of the chattel mortgage of April 15, 1891, Moore became embarrassed, and finally, shortly prior to March 5, 1900, he became and continued wholly insolvent. On May 16, 1900, the defendant, acting under the advice of counsel, and with the consent of Moore, took possession under the mortgage of April 15, 1891, of all the livery property then on hand, and on June 11, 1900, caused the same to be sold at public auction by the sheriff. It is for the net avails of this sale, amounting to $922.08, which the sheriff paid over to the defendant, that this suit is brought. The Passumpsic Savings Bank on September 15, 1900, proved its note of $2,510.75 as an unsecured claim against the bankrupt estate of Moore, as the mortgage held by the bank as security had been given by Moore in March, 1900, to defendant, and by him assigned to the bank, within four months of the filing of the petition in bankruptcy.

For the purpose of defeating the effect of the defendant taking possession of the livery property under his chattel mortgage of April, 1891, the trustee in bankruptcy presented a petition to the United States District Court of Vermont for leave to intervene as plaintiff in the Ryan attachment suit, and to have the lien of Ryan's attachment preserved for the benefit of the general creditors. This petition was dismissed by that court. The referee found that the defendant and his counsel knew when he took possession of the livery property, under his mortgage, that Moore was insolvent and was considering going into bankruptcy. The referee also found that he did not intend to perpetrate any actual fraud on the other creditors, or any of them, but he did intend thereby to perfect his lien on the livery property and make it available for the payment of his debt before other complications, by way of attachment or bankruptcy arose, and he understood at that time that it was probable that the Ryan attachment would hold good as against his mortgage. All the property of which defendant took possession was acquired by Moore with the full understanding and intent that it should be covered by the defendant's mortgage of April 15, 1891.

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the Court.

This is a contest between a trustee in bankruptcy representing the creditors of the bankrupt, and the defendant, the mortgagee in a chattel mortgage dated and executed April 15, 1891, and duly recorded April 18 of

that year. The defendant has paid some $500 of the indebtedness of the bankrupt for which defendant was liable as endorser on a note, and he remains liable to pay the note of $2,510.75, held by the Passumpsic Savings Bank, which was signed by him as surety.

The property taken possession of by the defendant under the chattel mortgage was sold by a deputy sheriff on the 11th of June, 1900, and the net avails of the sale, amounting to $922.08, have been paid over by the officer who made the sale, to the defendant.

This suit is brought by the trustee to recover from the defendant those net avails on the theory that the action of the defendant in taking possession and making the sale of the property was unlawful under the provisions of the bankrupt act.

The defendant had assisted the bankrupt in the purchase of the property and had endorsed notes for him in order to enable him to carry on the business of conducting a livery stable. This mortgage, to secure him for these payments and liabilities, was given some seven years before the passage of the bankrupt act, and at the time it was given it was agreed by the parties to it that the bankrupt might sell or exchange any of the livery stock covered by it as he might desire, and should by purchase or exchange keep the stock good, so that the defendant's security should not be impaired, and it was also agreed that all after-acquired livery property should be covered by the mortgage as security for the debts specified therein.

Under this agreement the bankrupt made sales, purchases and exchanges of livery stock to such an extent that on May 16, 1900, there remained but two horses of the property originally on hand. The stock as it existed on the above date was all acquired by exchange of the original stock, or with the avails of the old stock sold, or the money derived from the business.

There is no pretense of any actual fraud being committed or contemplated by either party to the mortgage. Instead of taking possession at the time of the execution of the mortgage, the defendant had it recorded in the proper clerk's office, and the record stood as notice to all the world of the existence of the lien as it stood when the mortgage was executed, and that the defendant would have the right to take possession of property subsequently acquired as provided for in the mortgage. The bankrupt was, therefore, not holding himself out as unconditional owner of the property, and there was no securing of credit by reason of his apparent unconditional ownership. The record gave notice that he was not such unconditional owner. There was no secret lien, and if defendant cannot secure the benefit of this mortgage, which he obtained in 1891, as a lien upon the after-acquired property, yet prior to the title of the trustee for the benefit of creditors, it must be because of some provision of the bank-

ruptcy law, which we think the court ought not to construe or endeavor to enforce beyond its fair meaning.

In Vermont it is held that a mortgage, such as the one in question, is good. The Supreme Court of that State has so held in this case, and the authorities to that effect are also cited in the opinion of that court. And it is also there held that when the mortgagee takes possession of after-acquired property, as provided for in this mortgage, the lien is good and valid as against every one but attaching or judgment creditors prior to the taking of such possession.

At the time when the defendant took possession of this after-acquired property, covered by the mortgage, there had been a breach of the condition specified therein, and the title to the property was thereby vested in the mortgagee, subject to the mortgagor's right in equity to redeem. This has been held to be the law in Vermont, (aside from any question as to the effect of the bankrupt law,) both in this case and in the cases also cited in the opinion of the Supreme Court of Vermont. The taking of possession of the after-acquired property, under a mortgage such as this, is held good, and to relate back to the date of the mortgage, even as against an assignee in insolvency. (*Peabody* v. *Landon*, 61 Vt. 318, and other cases, cited in the opinion of the Supreme Court.)

Whether and to what extent a mortgage of this kind is valid, is a local question, and the decisions of the State court will be followed by this court in such case. (*Dooley* v. *Pease*, 180 U. S. 126.)

The question that remains is, whether the taking of possession after condition broken, of these mortgaged chattels before, although within four months of filing the petition in bankruptcy, was a violation of any of the provisions of the bankrupt act?

The trustee insists that such taking possession of the after-acquired property, under the mortgage of 1891, constituted a preference under that act. He contends that the defendant did not have a valid lien against creditors, under that act; that his lien might under other circumstances have been consummated by the taking of possession, but as that was done within four months of the filing of the petition in bankruptcy, the lien was not valid.

Did this taking of possession constitute a preference within the meaning of the act?

It was found by the referree that when the defendant took possession of the property he knew that the mortgagor was insolvent and was considering going into bankruptcy, but that he did not intend to perpetrate any actual fraud on the other creditors, or any of them, but did intend thereby to perfect his lien on the property, and make it available for the payment of his debts before other complications, by way of attachment or

bankruptcy, arose. He then understood that Ryan's attachment would probably hold good against his mortgage. The question whether any conveyance, &c., was in fact made with intent to defraud creditors, when passed upon in the State court, is not one of a Federal nature. (*McKenna* v. *Simpson*, 129 U. S. 506; *Cramer* v. *Wilson*, 195 Id. 408.) It can scarcely be said that the enforcement of a lien by the taking possession, with the consent of the mortgagor, of after-acquired property covered by a valid mortgage is a conveyance or transfer within the bankrupt act. There is no finding that in parting with the possession of the property the mortgagor had any purpose of hindering, delaying or defrauding his creditors, or any of them. Without a finding to the effect that there was an intent to defraud, there was no invalid transfer of the property within the provisions of section 67*e* of the bankruptcy law. (*Sabin* v. *Camp*, 98 Fed. Rep. 974.)

In the case last cited the court, upon the subject of a preference, held that though the transaction was consummated within the four months, yet it originated in October, 1897, and there was no preference under the facts of that case. "What was done was in pursuance of the pre-existing contract, to which no objection is made. Camp furnished the money out of which the property, which is the subject of the sale to him, was created. He had good right, in equity and in law, to make provision for the security of the money so advanced, and the property purchased by his money is a legitimate security, and one frequently employed. There is always a strong equity in favor of a lien by one who advances money upon the property which is the product of the money so advanced. This was what the parties intended at the time, and to this, as already stated, there is, and can be, no objection in law or in morals. And when, at a later date, but still prior to the filing of the petition in bankruptcy, Camp exercised his rights under this valid and equitable arrangement to possess himself of the property and make sale of it in pursuance of his contract, he was not guilty of securing a preference under the bankruptcy law."

The principle that the taking possession may sometimes be held to relate back to the time when the right so to do was created, is recognized in the above case. So in this case, although there was no actual existing lien upon this after-acquired property until the taking of possession, yet there was a positive agreement, as contained in the mortgage and existing of record, under which the inchoate lien might be asserted and enforced, and when enforced by the taking of possession, that possession under the facts of this case, related back to the time of the execution of the mortgage of April, 1891, as it was only by virtue of that mortgage that possession could be taken. The Supreme Court of Vermont has held that such a mortgage gives an existing lien by contract, which may be enforced by the actual taking of possession, and such lien can only be avoided by an execution or

attachment creditor, whose lien actually attaches before the taking of possession by the mortgagee. Although this after-acquired property was subject to the lien of an attaching or an execution creditor, if perfected before the mortgagee took possession under his mortgage, yet if there were no such creditor, the enforcement of the lien by taking possession would be legal, even if within the four months provided in the act. There is a distinction between the bald creation of a lien within the four months, and the enforcement of one provided for in a mortgage executed years before the passage of the act, by virtue of which mortgage and because of the condition broken, the title to the property becomes vested in the mortgagee, and the subsequent taking possession becomes valid, except as above stated. A trustee in bankruptcy does not in such circumstances occupy the same position as a creditor levying under an execution, or by attachment, and his rights, in this exceptional case, and for the reasons just indicated, are somewhat different from what they are generally stated. (*Mueller* v. *Nugent*, 184 U. S. 1.)

It is admitted on the part of the counsel for the plaintiff in error that the rule in Vermont, in cases of chattel mortgages of after-acquired property, (where possession by the mortgagee is necessary to perfect his title as against attaching or execution creditors,) is that although such possession be not taken until long after the execution of the mortgage, yet the possession, when taken, (if it be before the lien of the attaching or execution creditor,) brings the property under the cover and operation of the mortgage as of its date—the time when the right of possession was first acquired. It was also admitted that the Supreme Court of Vermont has held that when a chattel mortgage requiring possession of the mortgaged property, to perfect it as to third persons, was executed more than four months before the commencement of insolvency proceedings, the taking of actual possession of the mortgaged property within the four months' period brought that property under the mortgage as of its date, and so did not constitute a preference voidable by the trustee, although the other elements constituting a preference were present. Many decisions of the Supreme Court of Vermont are cited to this effect. It will be observed, also, that the provisions of the State insolvency law in regard to void and voidable preferences and transfers were identical with similar provisions of the bankruptcy act of 1867. (*Gilbert* v. *Vail*, 60 Vt. 261.)

Under that law it was held that the assignee in bankruptcy stood in the shoes of the bankrupt, and that "except where, within a prescribed period before the commencement of proceedings in bankruptcy, an attachment has been sued out against the property of the bankrupt, or where his disposition of his property was, under the statute, fraudulent and void, his assignees take his real and personal estate, subject to all equitities, liens

and incumbrances thereon, whether created by act or by operation of law." (*Yeatman* v. *Savings Institution*, 95 U. S. 764.) See also *Stewart* v. *Platt*, (101 U. S. 731;) *Hauselt* v. *Harrison*, (105 Id. 401.) Under the present bankrupt act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or encumbrance of the property which is void as against the trustee by some positive provision of the act. (*In re Garcewich*, 115 Fed. Rep. 85, 89, and cases cited.)

It is true that in the case in 95 U. S. 764, the savings institution had a special property in the certificates which were the subject of dispute, and had possession of them at the time of the bankruptcy proceedings, and it was held that the institution was not bound to return them, either to the bankrupt, the receiver or the assignee in bankruptcy, prior to the time of the payment of the debt for which the certificate was held. So the State court held in this case, where the defendant took possession under the circumstances detailed, by virtue of his mortgage, and where he had the legal title to the property mortgaged, after condition broken, that the possession thus taken related back to the date of the giving of the mortgage, and in thus enforcing his lien there was not a violation of any of the provisions of the bankruptcy act.

In *Wilson* v. *Nelson*, (183 U. S. 191,) it was held that the bankrupt had committed an act of bankruptcy, within the meaning of the bankrupt law, by failing, for at least five days before a sale on the execution issued upon the judgment recovered, to vacate or discharge the judgment, or to file a voluntary petition in bankruptcy. The judgment and execution were held to have been such a preference, "suffered or permitted" by the bankrupt, as to amount to a violation of the bankrupt act. Although the judgment was entered upon the power of attorney given years before the passage of the bankrupt act, it was nevertheless regarded as "suffering or permitting" a preference, within that act. This is not such a case. As we have said, there is no finding that the defendant had reasonable cause to believe that by the change of possession it was intended to give a preference. As the State court has said, it was rather a recognition of what was regarded as a right under the previous agreement contained in the mortgage.

Nor does the existence of the Ryan attachment, or the chattel mortgage of March 5, 1900, executed by the bankrupt and delivered to the defendant and by him assigned on the 23d of March, 1900, to the bank, create any greater right or title in the trustee than he otherwise would have. The trustee moved under section 67*f*, on notice to the defendant, for an order that the right or lien under the Ryan attachment should be preserved, so that the same might pass to the trustee for the benefit of the

estate, as provided for in that section. This was denied. And unless such permission had been granted, the lien of the attachment was not preserved by the act, but, on the contrary, it was dissolved under section 67*c*.

The mortgage assigned to the bank, and the attachment obtained by Ryan having been dissolved by the bankrupt proceedings, the defendant's rights under his mortgage of April 15, 1891, stood the same as though there had been no subsequent mortgage given, or attachment levied. This is the view taken by the State court of the effect of the dissolution of the mortgage and attachment liens under the bankrupt act, and we think it is the correct one. It is stated in the opinion of the State court as follows:

"It is urged that with the annulment of the attachment, the property affected by it passed to the trustee as a part of the estate of the bankrupt under the express provisions of section 67*f*. There would be more force in this contention were it not for the provision that, by order of the court, an attachment lien may be preserved for the benefit of the estate. If there is no other lien on the property, there can be no occasion for such order; for on the dissolution of the attachment, the property, unless exempt, would pass to the trustee anyway. It is only when the property for some reason may not otherwise pass to the trustee as a part of the estate that such order is necessary. We think such is the purpose of that provision, and that unless the lien is preserved, the property, as in the case at bar, may be held upon some other lien and not pass to the trustee. (*In re Sentenne & Green Co.*, 120 Fed. Rep. 436.)"

We think the judgment of the Supreme Court of Vermont was right, and it is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.